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The Implications of Property Diversity

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Abstract

Property in land is a dependable institution, often dull, sometimes arcane. Without giving it much thought, we tend to respond to property in conventional, unreflective ways. We assume with property that 'what we see is what we get'.[1]

However this unimaginative way of looking at property in land may be but a half-truth of the dialectic. Perhaps, property is a lot more diverse than the orthodoxy we suppose? This question forms the core of this thesis, the elaboration of an alternative description of property in land termed 'property diversity'. The thesis argues that the descriptive truth of property, its grounded reality, is far more heterogeneous than we are conditioned to recognize. What we have got with property in land is what 'we have talked ourselves into seeing'[2], a liberal, post-enclosure paradigm that is universalizing in its effect. Contrary to the descriptively inadequate private model, human landscapes are 'intensely propertied places'[3] where a plethora of rights, uses and claims overlap, compete and co-exist amidst inter-connective 'mosaics' of private, public and common interests in land. These 'interests' are themselves equally diverse; ancient as well as novel, common law and statutory, shared and exclusive. And to complete the mosaic, our 'ownerships' are likewise pluralistic, ranging from strictly enforceable right through to vague concepts of belonging, illusory at law, yet routinely acted upon.

In articulating a reconceptualized property right in land, the thesis adopts the following broad structure. First, it seeks to explain why the private ownership model prevails, such that 'property' and 'private property' are mostly synonymous. Both dominant and domineering, this narrow view stresses the primacy of individualism, the power of exclusion, and the values of commodity. Second, it argues that this perspective is an incomplete description of property in land, canvassing the richness of the public and common estates, and the under-regarded social and communitarian nuances of private property.[4] Third, it describes a theory of property diversity in land, more like Hanoch Dagan's 'full (sometimes cacophonous) symphony' than any 'singular melody line'[5].

[1] Carol Rose, 'Seeing Property' in *Property and Persuasion Essays on the History, Theory and Rhetoric of Ownership* (1994), 297.
[2] Ibid.
[3] Nicholas Blomley, *Unsettling the City Urban Land and the Politics of Property* (2004) xvi.
[4] For example, Gregory Alexander, 'Property's Ends The Publicness of Private Law Values' (2014) 99 *Iowa Law Review* 1257.
[5] Hanoch Dagan, *Property Values and Institutions* (2011).

Fourth, it considers the implications of property diversity for two 'blind spots' in modern property discourse, the proprietorial place of community, described by Joseph Sax as the 'missing blank in American law'[6] and the generation of obligation as an incident of land ownership, again in Sax's words, the law's 'awkward little secret'[7].

The thesis canvasses the literature of the private, public and common estates, property and community scholarship, and stewardship discourse. It also reaches beyond legal property with a brief foray into legal geography and sustainable urban design. Its novelty lies in not only collating this literature into one body of work, but in viewing it through the prism of landed property diversity.

This reconceptualization has consequences; it shifts the focus from the private right to a wider perspective, contextualizes the *res* as a critical element of propertied relations, and provides a theoretical construct for an alternative 'seeing' of property right in land, one where a 'swarm of possibilities'[8] offers new imaginings for property in land.

[6] Joseph Sax, 'The Rights of Communities: A Blank Space in American Law', July 11, 1984, Natural Resources Law Center, University of Colorado, School of Law.
[7] Joseph Sax, *Playing Darts with a Rembrandt Public and Private Rights in Cultural Treasures* (1999) 59.
[8] Paul Carter, *Dark Writing Geography, Performance, Design* (2009) 1.

Declaration by author

This thesis is composed of my original work, and contains no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

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Keywords

Property law; property theory; land law; diversity; private, public, and common property; stewardship; property and community.

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The Implications of Property Diversity

Introduction

Lawyers and non-lawyers alike derive great comfort in the much-vaunted stability of property in land. It is a dependable institution, often dull, sometimes arcane. Without giving it too much thought, we tend to respond to property in conventional, unreflective ways. We assume with property that 'what we see is what we get'.[1]

However this unimaginative way of looking at property in land may be but a half-truth of the dialectic. Perhaps, property is a lot more diverse than the orthodoxy we suppose? This question forms the core of this thesis, the elaboration of an alternative description of property in land I call 'property diversity'. I argue that the descriptive truth of property, its grounded reality, is far more heterogeneous than we are conditioned to recognize. What we have got with property in land is what 'we have talked ourselves into seeing'[2], a liberal, post-enclosure paradigm universalizing and totalizing[3] in its monistic effect. This thesis argues that contrary to the descriptively inadequate private model, human landscapes are 'intensely propertied places'[4] where a plethora of rights, uses and claims overlap, compete and co-exist amidst inter-connective 'mosaics' of private, public and common interests in land. These 'interests' are themselves equally diverse; ancient as well as novel, common law and statutory, shared and exclusive. And to complete the mosaic, our 'ownerships' are likewise pluralistic, ranging from strictly enforceable right through to vague concepts of belonging, illusory at law, yet routinely acted upon.

Early inspiration for this thesis came from American property scholar Carol Rose. Rose writes of 'seeing' property in land, a phenomenon especially

[1] Carol Rose, 'Seeing Property' in *Property and Persuasion Essays on the History, Theory and Rhetoric of Ownership* (1994), 297.
[2] Ibid.
[3] Nicholas Blomley, *Unsettling the City Urban Land and the Politics of Property* (2004) 102.
[4] Ibid, xvi.

observable in places of great natural beauty, imperious landscapes where property 'hits you in the eye'. Rose describes seeing property in diverse forms, as pictures, metaphors, narratives or illusions. For her, the fence, well-trodden path, keep out sign, bundle of sticks, or folkloric tales of scarcity, are convenient ways of 'seeing' property, easily recognizable images that enable us to relate to the places in which we live. Canadian legal geographer Nicholas Blomley is another seminal influence. Blomley uses a neighborhood in his home city of Vancouver, British Colombia, to 'map' the unreliability of the private ownership model to represent the lived experiences of its inhabitants.

Critically, to begin to 'see' property in the expansive and imaginative ways that Rose envisages, or Blomley endeavors to 'map', reveals certain self-evident truths about property in land. This enhanced 'visibility' renders itself incrementally to the observer, a re-imagination that ultimately offers an alternative account of property in land. As a reconceptualization, it provides a more contextualized explanation that describes property patterns at a level of detail and accuracy that the private ownership model can only begin to sketch out.

The thesis adopts the following broad structure. First, it seeks to explain why a narrow private ownership model of property prevails, such that 'property' and 'private property' are for most purposes synonymous. Both dominant and domineering, this singular liberal view stresses the primacy of individualism, the power of exclusion, and the values of commodity. If represented geographically, this paradigm depicts only the boundaries of private parcels, the arbitrary de-contextualized lines that pre-figure the extent of an owner's right to exclude. Second, it argues that this perspective is an inadequate and incomplete description of property in land, canvassing the richness of the public and common estates, and the under-regarded social and communitarian nuances of private property.[5] Third, it describes a theory of property diversity in land, an articulation more representative of Hanoch

[5] For example, Gregory Alexander, 'Property's Ends The Publicness of Private Law Values' (2014) 99 *Iowa Law Review* 1257.

Dagan's 'lived experiences' of property. Fourth, it considers the counterveiling implications of property monism and diversity for certain 'blind spots' in modern property discourse, the proprietorial place of community, and the generation of obligation as an incident of land ownership. This thesis suggests that a simplistically private view of property in land yields normatively undesirable outcomes. However it is not the intent of this thesis to make the *normative* argument that we ought not to 'see' property in land through this hegemonic view. Instead, its focus is to identify these descriptive failings, to offer up an alternative vision, and to explore a number of implications of a reconceived diverse property mosaic.

Property diversity in land is described in detail in part 2, chapter 4. But given its amorphous nature, and how this thesis is structured, it is desirable in this Introduction to offer a brief, overarching description of the concept. Property diversity *sees* the fullest range of property patterns in human landscapes, a 'higher altitude' perspective that yields an unfamiliar vantage of a familiar subject. Importantly, it places the orthodox private right in proportionate context, amongst other less 'seen' and less familiar property forms. Property diversity is the aggregate of a plurality of *types*, *interests*, and *ownerships.* Characteristically, it is *contextual, multivalent*, *use*-premised and *eclectic,* amongst others. Our many and varied relationships with land define its scope and form its content.

Type refers to the full panoply of existing private, public and common interests in land, and the many hybrid variants that arise in response to context or exigency. *Interests* comprise the vast array of 'estates' we hold in land; corporeal, incorporeal, common law, statutory or *sui generis. Ownership* describes the vested interests we claim over land, the full gamut of propriety ranging from enforceable right under Joseph Singer's 'castle' view, to qualified forms of private ownership tempered by norms of social-obligation, 'ownerships' based on public and common title, and beyond right to vague concepts of 'belonging'.

Contextual qualities of diverse property make the *res* the central object of the landed relationship. It defies the ubiquity of the bundle metaphor, where any stick can be substituted for another. John Lovett cites the *Land Reform (Scotland) Act* 2003 (LRSA) as an innovative exemplar of a property regime that *contextualizes* a new property right[6] to particular place. The LRSA overcomes an 'imaginative paralysis… about what is possible in property law design.'[7] Much like real property's 'extraordinary return to the land',[8] working examples of re-physicalized (and diverse) property dilutes the hegemonic paradigm. Context also de-emphasizes the importance of arbitrary boundary lines. Analogous to Larissa Katz's 'agenda-setting', diverse property prioritizes an owner's *use* of their land, not it's bounded dominion. When exercised in ways that are reasonable and proportionate, *use* enlivens the potential of other 'owners' to enjoy co-existing, contemporaneous rights in the same land.

The LRSA also actualizes a property regime that incorporates *multiple values*, another key characteristic of diverse property. That public rights of responsible access can be accommodated with an owner's privacy and security of residential use, demonstrates that competing values need not be mutually exclusive. And finally, the *eclecticism* of diverse property, perhaps an inevitable corollary of context, is another defining attribute. Escaping the closed list of 'what is property' in land requires an awareness of the 'otherness' in real property, and a willingness to consider the *proprietorial* attributes of erstwhile marginal interests.[9]

As stated, the thesis is structured in two parts. Each part consists of three chapters. Part 1 argues that the hegemonic depiction of property in land is inaccurate and incomplete. In so arguing, Part 1 seeks to 'clear' a theoretical

[6] The 'responsible right of access'
[7] John Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska Law Rev.* 739, 742. Lovett cites extensive public education for both access takers and landowners as overcoming law and economics analyses that deride contextual property as imposing unfeasibly high information processing costs.
[8] This describes the recent resurgence in community gardens, urban farms etc. identified by Sue Farren in 'Earth Under the Nails The Extraordinary Return to the Land' in N Hopkins ed, *Modern Studies in Property Law* (7th ed., 2013)
[9] A J van der Walt, 'The Marginality of Property' in G Alexander & E Penalver eds, *Property and Community* (2010).

space for a different conceptualization, the diverse property mosaic. In chapter 1, private property is shown to be an adaptable 'institution',[10] more qualified than its absolutist rhetoric suggests. The chapter challenges private property's 'exclusion thesis',[11] arguing that the right to exclude is inherently contingent, and as such capacious of other co-existing interests in land. In chapter 2, public property is described not as a passive *res* awaiting capture, but an under-regarded estate with its own tenets and rationales, a comedy[12] where 'the more the merrier' diffuses ownership and fosters propriety in the pursuit of an egalitarian, well-ordered society. In chapter 3, common property is seen to be different again, a halfway house, where an outside private shell conceals an inside communitarian collective. Common property manifests in unlikely, but everyday places, sporting clubs, community associations, company title units, and so on, its 'obviousness' and under-estimated strengths giving lie to the overstated tragedy of the commons.

Part 1 adopts an accepted but not universal typology of property interests in land - *private, common,* and *public.* What distinguishes one form of property from another is (to borrow a bundle analogy) 'how the quality and content of the bundle of rights varies in practice, and who holds the sticks.'[13] With private property, the 'who' question is fairly straightforward. Jeremy Waldron describes this as the 'single organizing idea' of private property that a 'certain specified person' is able to determine how a specified resource is to be used.'[14]

[10] Hanoch Dagan, *Property, values and institutions* (2011)
[11] 'Private property is generally 'characterized by rights of exclusion… while that which is characterized by rights of inclusion are termed public or common property.' Jonette Watson Hamilton and Nigel Bankes, 'Different Views of the Cathedral: The Literature on Property Law Theory' in A. McHarg et al eds,,*Property and the Law in Energy and Natural Resources* (2010)
[12] Carol Rose, 'The Comedy of the Commons: Custom, Commerce, and Inherently Public Property', (1986) 53 *U. Chi LR*. 711.
[13] Richard Barnes, *Property Rights and Natural Resources* (2009) 11.
[14] Jeremy Waldron, *The Right to Private Property* (1988) 59-60; Jeremy Waldron, 'What is Private Property?' (1985) 5 *Oxford J. Legal Stud*. 313.

While private property is relatively uncontested,[15] there is frequent misapprehension as to meanings of the 'common' and 'public' estates. Many jurists lump non-private property into a single 'collective' property category. Others talk of 'state' property. Others confuse the two. Michael Brill observes that common property provides for 'community life', a sociability 'with people you somewhat know', [16] while 'public property' provides for 'public life' and a shared sociability 'with a diversity of strangers.'[17] Common property is not public property; it refers to use rights vested in community members who derive their propertied relationship with land through membership of that community. Outsiders are trespassers on common lands. By contrast, the 'who' in public property is less clear. Chapter 2 posits that ultimately the 'who' is the diffused 'unorganized public'.

In Part 2, chapter 4, the mosaic is particularized and deconstructed; its underlying principles, unifying themes, and constituent elements canvassed in separate turn. Chapter 4 also locates the mosaic in the literature of sustainable community, and then 'places' it *in situ*, through three case studies. These studies note a serendipitous *coincidence* between sustainable, so-called 'livable' communities, and their diverse patterns of property. The chapter does not argue that property diversity is a cause of such livability, but it does observe its otherwise unremarked presence. Chapter 5 next examines the routine failure of the private ownership model to generate obligation alongside right as an incident of land ownership. By contrast, property diversity offers a paradigm where obligation is both theoretically feasible and normatively desirable, where stewardship is less likely to remain the law's 'awkward little secret'.[18] Chapter 6 concludes with an analysis of our under-

[15] Uncertainty lies on the fringes, for example government ownership of an office building may be the practical equivalent of private ownership, but generally the 'owner answer' is clear
[16] Michael Brill, 'Problems With Mistaking Community Life for Public Life' (2002) 14(2) *Places* 48, 50. 'Each is different, in scale, density and the 'physical environments it needs to be robust.'
[17] Brill, above n15, 50. Brill identifies community sociability occurring at varied locales, 'a mix of both semi-public and semi-private places, like the neighborhood bar, the often- walked public street, the school PTA meeting and the church dinner.' Public sociability occurs 'in the square, park and street.'
[18] Joseph Sax, 'The Rights of Communities: A Blank Space in American Law' presented July 11,
1984, Natural Resources Law Center, University of Colorado, School of Law

developed proprietorial relationship with community, a consequence of a polarizing liberal paradigm that views community as a suspicious intermediary between the welfare-maximizing individual and the regulatory state. Again, it offers an alternative view, one where community has a resonance that helps to fill Joseph Sax's 'blank legal space'.[19] Describing property in land in ways that connect people to context, rather than as abstract rights between persons about things, makes notions of community and obligation more feasible within a diverse property discourse.

In this thesis, the word 'property' is liberally used. But in restricting itself to real property (and not for example personalty or intellectual property), the term refers only to our many propertied relationships with *land.* Its remit is broad and expansive. As foreshadowed, it encapsulates not only formal rights enforced by the state, but also uses, practices, and claims 'observed' or 'enforced' through custom, norm, or other unlikely sources outside property's 'central logic'.[20] Its open-ended approach to propertied interests in land is the antithesis of Wesley's Hohfield's precise taxonomy. To restrict its meanings to a closed list is to subvert a key purpose of this thesis, to 'notice the margins',[21] and the diversity inherent therein. To cite the Australian High Court, 'property' is 'not a monolithic notion of standard content and invariable intensity [but] the most comprehensive of all the terms which can be used… indicative and descriptive …of all or any of the very many different kinds of relationship between a person and a subject matter.'[22]

As a forceful advocate of the private right to exclude, Henry Smith is an unlikely ally to enrol in support of property diversity. However Smith's observations of property as 'the law of things'[23] are insightful and cogent. Smith writes, '[t]he first step toward understanding private law is to try not to take things for granted and to be as attentive to how things are *not* as to how things are.' This thesis agrees with, and seeks to enact Smith's observations.

[19] Ibid
[20] AJ van der Walt, 'The Marginality of Property' in Alexander & Penalver, above n8.
[21] Ibid
[22] *Yanner v Eaton* (1999) 201 CLR 351
[23] Henry Smith, 'Property as the Law of Things' (2012) 125 *Harvard Law Rev.* 1691, 1692

It does not take ‘property’ in land for granted. It does not unthinkingly assume that ‘what we see is what we get.’ In large part, its attentive focus is on ‘how things are not’. In (unwittingly) following Smith’s prescriptions, its ambition is to take an imaginative step toward a better understanding of the vast and rich diversity of property in land.

Chapter 1 Private Property and the Domineering Right to Exclude

1. Introduction

Private property has been the dominant (and domineering) form of property in land since the 18th century. It has successfully marginalised and discredited alternative forms of property, such that today we see 'property' through a myopic prism of private property rights. Hence for most people, the terms 'property' and 'private property' are synonymous and interchangeable. This chapter 1 challenges this narrow and incomplete description of modern private property that has conflated its reach and concealed its nuance. The chapter's aim is to better depict the private estate, and in so doing, clear sufficient 'space' for property diversity.

The all-consuming edifice of private property, its 'sole and despotic dominion'[1] and hallmark right to exclude, is a structure less absolute than its persuasive[2] rhetoric exhorts. Private property was never unqualified or unfettered in its reach; public and communal rights and restraints have long defined the ambit of private rights. Likewise, the divide between public and private is (and was) porous, private rights exist in public property and public rights in private. For all its apparent and substantive dominance, a dual paradox lies at the heart of private property. First, the absoluteness of private rights, manifested in the right to exclude, is reliant on a flawed assumption that the public-private dichotomy is distinct and inviolate. This misassumption accentuates the propensity of private property rights to conflate, in the process distorting their integrity and obfuscating the coherency of private property's rationales. Second, the flawed public-private divide itself is premised on an historic interpretation of private property frozen in time. The mantra that private property must be stable and certain, does not equate to its immutability.

[1] William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769* (1979)

[2] Rose argues that property is 'persuasion', who can yell loudly and consistently and get their message heard, Carol Rose, 'Seeing Property' in *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (1994).

Private property is a dynamic social institution, subject to historical, societal and political pressures, one that is constantly (albeit incrementally) dynamic.

The *substance* of private property is the security it affords right holders in their exclusive use and enjoyment of their rights. Yet the narrative or rhetoric of private property has diverged from this central organizing basis. Secure exclusivity of use has become exclusivity *simpliciter,* with the paramount right to exclude overshadowing the complexities and nuances of private property. Like private property itself, the right to exclude is not only singularly dominant, but domineering. This perversion has unduly distorted property discourse and fed a propensity for courts and legislatures to overstate the extent of private property rights. Private property is better understood as securing an exclusivity of use, coupled with a qualified freedom from interference, and not an arbitrary exclusivity of possession. Such a descriptive re-emphasis does not diminish the essence of private property, its security of title. However it does enable the theoretical 'oxygen' for other potentially co-existing property rights, uses and claims, as well as duties or obligations, to subsist. By seeing private property in such a light, we begin to see it in a pluralistic, diverse context.

In this chapter the history of private property is analysed as it pertains to 'settler societies', particularly Australia, the United States, and New Zealand. Beginning in part 2, and the seminal 17th and 18th century writings of William Blackstone and John Locke, parts 3 and 4 then trace the shift from a pre-industrial to industrial society, and the implications and opportunities this presented to a burgeoning private property freed from the inconvenient strictures of English property doctrine and energised by the bundle of rights metaphor. Parts 5 and 6 concentrate on the often-overlooked dynamism of private property, and the complexities that arise when stasis distorts key aspects of private property, exemplified by the public-private divide. Part 7 then considers the plausible yet descriptively flawed narrative of private property that has come to dominate, while part 8 distils the qualitative attributes of private property that form the core of its revised description. The

chapter concludes in part 9 by re-examining the rationales and justifications of the critical right to exclude in light of this re-defined paradigm.

2. Blackstone, Locke and historical origins

In charting the rise of private property and its hallmark right to exclude, it is convenient (but not contrived) to commence with the *Commentaries* of William Blackstone in 1765. Blackstone wrote his *Commentaries* at a crucial era as England vigorously expanded its colonial empire. Blackstone's timely summation of the great body of common law jurisprudence enabled this important (and transportable) compendium to reach far beyond English shores, as Anglo-settler societies extended across North America and the Pacific Rim.[3] Blackstone's thinking proved foundational to many newly establishing jurisdictions.[4] Indeed his summaries of the law were noetic. This was particularly so for concepts of 'property' as nascent societies struggled with the political and social imperatives of settling vast, empty hinterlands, whether in pursuit of Manifest Destiny, or more mundane, practical policies of closer settlement.[5] Blackstone captured a notion of property that conformed to the spirit of the times, an articulation that matched the zealous conquering of frontier.

In writing of 'property', Blackstone famously observed

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of ay other individual in the universe.

Unsurprisingly, much emphasis was placed on Blackstone's 'sole and despotic' prescription to justify an absolutist, highly individualised and exclusive notion of property in settler societies. Moreover, his definition

[3] Stuart Banner, *Possessing the Pacific* (2008).
[4] Albert Alschuler, 'Rediscovering Blackstone' (1996) 145 *U. Pa. L. Rev.* 1.
[5] The U.S. *Homestead Act 1862* limited fee grants to new settlers of (unviable parcels of) 160 acres, the objective to promote closer settlement.

divorced property from the things of the external world. But as Carol Rose observes, Blackstone's definitive assertion (Rose called it the 'Exclusivity Axiom') was immediately followed by his own doubts as to the origin of such seemingly unequivocal rights (Rose's 'Ownership Anxiety'):[6]

> And yet there are very few, that will give themselves the trouble to consider the origin and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in title…We think it enough that our title is derived by the grant of the former proprietor,…not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow creatures from a determinate spot of ground…

Rose argues that the problem is that not enough property jurists 'have read that *much* Blackstone.' If those who quote Blackstone's definition read further, they might come to think that Blackstone posed his definition more as a metaphor than a literal description….a point of departure.'[7] Indeed, had scholars selectively preferred the later line in the same chapter 'so it is agreed…that occupancy gave…the original right to the permanent property in the substance of the earth itself; which excludes everyone else but the owner from the *use* (emphasis added) of it', then property rights may have been more widely viewed as usufructs or use rights? Rose concludes that Blackstone's so-called 'Exclusivity Axiom' is a metaphoric over-statement, a 'trope', that 'conceal[s] the interactive character of property and give[s] an inappropriately individualistic patina to this most sociable of human institutions.'[8]

Yet it is not just Blackstone's text that was problematic, it was also the context in which he wrote. As Eric Freyfogle notes, Blackstone had different ideas

[6] Carol Rose, 'Canons of Property Talk, or Blackstone's Anxiety' (1998) 108 *Yale L.J.* 601; Carol Rose, 'The Moral Subject of Property', (2006) 48 *Wm. & Mary L. Rev.* 1897, 1904.
[7] Rose, above n6, 602.
[8] Ibid, 632.

about 'dominion' derived from late 18th century English agrarian society, than we may understand the term in a 21st century urban environment. Freyfogle argues 'dominion' to Blackstone meant 'the right to quiet enjoyment…the right to halt any appreciable interference by a neighbor'.[9] Pointedly this did not equate to the absolute right to exclude. Rather it contemplated contexts where multiple rights co-existed lawfully, where reasonable co-enjoyment was implied, but unreasonable interference with another's peaceful use and enjoyment was an actionable breach of 'dominion'. Carol Rose likewise factors in context, positing that Blackstone was aware of the 'pervasive and serious qualifications on exclusive dominion' arising from then feudal and entailed limitations on estates, and the 'general neighborly responsibilities of riparian and nuisance law.'[10] Murray Raff is likewise dismissive of the dogmatic common law view that property is 'an absolute egocentric dominion'. Raff describes this view as a 'self-evident truth without the extensive reference to authoritative sources which one might expect with respect to such a dramatic conclusion'.[11] Raff also contextualises Blackstone's writings, 'at a time when common lands were being enclosed, and memory of the English Revolution was not so distant, it was not surprising that he would have in mind the power to exclude others from private property – especially the Crown.' [12] Blackstone the alleged absolutist similarly acknowledged the law of waste and nuisance as limits on the private owner's dominion.[13]

More significantly, Blackstone's 'context' was one where non-exclusive property rights subsisted and co-existed with private rights. While the enclosure movement had gained considerable momentum in the second half of the eighteenth century, common property rights were still widespread. The myopia that 'property' and 'private property' were synonymous and interchangeable terms had not taken hold, rather property existed in more diverse and pluralistic forms. But Blackstone's 'sole and despotic' refrain was the contemporary equivalent of private property's 'sound bite'. Like most

[9] Eric Freyfogle, *The Land We Share: Private Property and the Common Good* (2003) 68.
[10] Rose, above n6, 603.
[11] Murray Raff, 'Environmental Obligations and the Western Liberal Property Concept', (1998) 22 *Melb. Univ. Law Rev.* 657, 662.
[12] Ibid, 665.
[13] Ibid.

'sound bites', they sell perception, a message, not substance or nuance. This message, Rose's 'trope', proved too successful, thereby informing (and distorting) an absolutist exclusive notion of private property, to the detriment of private property's more subtle and intricate qualifications.

If William Blackstone articulated a key (albeit selective) mantra, John Locke provided the theoretical underpinning for private property in the crucial early phases of settler society. Indeed Lockean notions of 'property' continue to stress the primacy of individual dominion, and are often used to describe politically conservative approaches to private property rights. Locke wrote a century before Blackstone, but his themes of the inherent worth of individual labour struck an especial chord in republican America.

> The basic Lockean system of property as a license for unlimited individual accumulation via unilateral action has held a powerful place in the American pantheon of political thought since the Revolution.[14]

According to Locke, ownership of one's own body was the starting point to justify the private ownership of external things. When one mixed individual labour with things found in the common fund, or natural world, something of value was created. Morally the fruits of one's labour justified that 'thing' being owned by the person whose labour had created it.[15] Moreover this transfer of ownership was good for both the individual and the collective whole, improving land adds value (by ten-fold in Locke's estimation), an apt political narrative. Some value owned by an individual is better than no value owned by the collective. Locke's 'labour theory' corroborated the individual acquisition of private property transformed by 'sweat equity', and provided a powerful albeit naïve justification for private property. But Locke also recognised the qualifications to his theory of property, the oft-cited proviso that there remained 'enough and as good' land for others, and that there was to be no wasteful surplus in one's acquisition, no 'spoilage'. Absolutism, even at the frontier, was always tempered by limit and restraint.

[14] Leigh Raymond, *Private Rights in Public Resources* (2003) 45.
[15] Raymond above n14, 44-45; Freyfogle, above n9, 110-115.

The Lockean vision of an 'agrarian democracy of small, self-sufficient property owners'[16] proved more potent in its rhetoric than its reality, as settler societies continued to evolve. Its rhetoric of rugged individualism however has remained a resilient image for the institution of private property, and much like Blackstone's 'sole and despotic dominion' has developed noetic qualities that continue to speak to simplistic absolutism rather than complex subtlety.

3. The expansion of private property in settler societies

Informed by Blackstonian and Lockean ideals, the subsequent expansion of private property in settler societies in the later 18th and earlier 19th centuries was driven in large part by two contemporaneous influences: the political imperative of government to encourage closer settlement, and the desire for secure and durable property rights on the part of the new settler. The political imperative was 'nation building'; fledgling colonies or republics such as Australia, New Zealand and the U.S. were encouraging their citizens and subjects to settle the so-called 'waste lands' in ways that corroborated Locke's labor theory of property. Rewarding work on the frontier with land on the frontier seemed an equitable and efficient means of achieving Manifest Destiny, particularly where unoccupied land was perceived as a liability or weak point in the new colony or nation.[17] Because unoccupied land carried a negative value to the Crown or federal government, giving it away to those who would strengthen the nation geographically and economically made sense. In the latter regard, the Lockean view of ownership also intersected with the classical economic view of efficient use of resources.

The second half of the equation was a desire on the part of the waves of new settlers to *acquire* land. Legal historian John McLaren observes the unparalled opportunities settler societies provided to new immigrants to

[16] Sally Fairfax et al, *Buying Nature: The Limits of Land Acquisition as a Conservation Strategy*, 1780-2004 (2005) 16.
[17] Daniel Bromley, 'Private Property and the Public Interest: Land in the American Idea.' in William G. Robbins and James C. Foster (eds), *Land in the American West: Private Claims and the Common Good*, (2000).

secure more durable and clearer private property rights, particularly accentuated by recent experiences of dispossession from common lands. McLaren further observes a 'selective historical amnesia' when it came to the 'forgetfulness of customary rights in common to land which settlers or their recent ancestors had enjoyed under English or Scots law'.[18] Opportunity and selective amnesia signalled a strong preference for private property, and its attributes of security or fixity of tenure. Thus governments promised homestead title, or fee simple selection rights under legislation such as the 1862 Robertson Land Act in New South Wales. Frequently the grants were a post-hoc validation of the status quo of possession.

Andrew Buck identifies this trend as an early manifestation of a distinctly Australian form of property law.[19] Australian property departed from its English parentage by its emphasis on a universal and egalitarian access to land. Buck considers such 'possessive egalitarianism',[20] an equal right to acquire, as a defining feature of Australian property. More broadly, property in the settler context was a market commodity, not an incident of family privilege, power, and sinecure. Such universality of access triggered an early land rush by 'squatters', who defied colonial authorities and ignored vain attempts to restrict settlement within the official boundaries.[21] Land settlement policies had to adapt quickly to meet this expansionary exigency, initially in the form of a *sui generis* private pastoral tenure[22] and finally selection rights to freehold provided the settler improved their parcel. The vicissitudes of drought in New South Wales in the late 1840s forced many sheep men, known as 'Prophets', to New Zealand, where runs were taken up in the foothills and eastern slopes of the South Island Alps, again with the exhortation to settle the empty

[18] John McLaren, 'The Canadian Doukhobors and the Land Question: Religious Communalists in a Fee Simple World' in *Land and Freedom: Law Property Rights and the British Diaspora* (2001) 135.
[19] Seen in unique property rights like crop liens or pastoral leases, Andrew Buck, *The Making of Australian Property Law* (2006).
[20] Ibid, 138.
[21] Stephen Roberts*, History of Australian Land Settlement 1788-1920* (1924); Stephen Roberts, *The Squatting Age in Australia* (1935); C J King, *An Outline of Closer Settlement in NSW* (1957); Peter Burroughs, *Britain and Australia 1831-1855 A Study in Imperial relations and Crown lands Administration* (1967).
[22] *Imperial Waste Lands Occupation Act 1846* and Order in Council March 1847; Henry Reynolds and Jamie Dalzeill, 'Aborigines and Pastoral Leases – Imperial and Colonial Policy 1826-1855', (1996) 19 *UNSW Law Journal* 315.

interior.[23] In the United States westward-bound 'settlers created the impetus for legal change by running roughshod over established property laws (favouring absentee land speculators) and creating for themselves communities governed by their own self-serving conception of just property relations…. Echoing John Locke's discussions of property… settlers frequently argued that "possession was the best title" and that to obtain true ownership of the wilderness lands on the frontier, a putative owner "must not only claim it, but annex his labor to it, and make it more fit for the use of man; till this be done it remains in the common stock, and anyone who needs to improve it for his support, has a right."'[24] By 1862 the *Homestead Act* accommodated this factual reality by sanctioning the grant of 160 acres of private fee simple title to settlers who improved their holdings.

In this relatively narrow temporal window, the expanding institution of private property reflected its pre-industrial, agrarian context. Eric Freyfogle saw this expression of private ownership as a peaceable exercise of dominion or *quiet enjoyment* of the land, a settled agrarian image of private ownership that 'today might be called the community or ecological vision of private property, given that it protects lands and communities while encouraging lasting ties between people and places.'[25] 'The essence of this private property was the right to remain undisturbed in one's use of it'[26] and conversely not to interfere with other's peaceful use of their lands. It did not require nor demand an absolute right to exclude. Ironically (and tragically) such 'settled' and 'protective' principles did not apply to the dispossessed indigene.[27] The settled agrarianism of Freyfogle was enforced by the 'do no harm' principle of *sic utere tuo ut alienum non laedas* (use your property in such a way so as to not disturb/harm others). Nuisance law thus protected 'settled' property rights

[23] These settlers had 'unlimited faith in the squatting system and a great contempt for freehold.' L Acland, *Early Canterbury Runs* (1930) 2; William Jourdain, *Land Legislation and Settlement in New Zealand* (1925).
[24] Eduardo Penhalver & Sonia Katyal, *Property Outlaws: How Squatters, Pirates, and Protestors Improve the Law of Ownership* (2010) 55-56.
[25] Freyfogle above n9, 37-38.
[26] Ibid, 56.
[27] The irony lost on new settlers was that the dispossession of indigenous landholders mirrored in historical terms the dispossession arising from the efficient enclosure of common 'waste lands' into productive private lands. Buck, above n 19, 14-30.

in terms of restraining interferences with a private owner's use and enjoyment rights.

4. The evolving bundle of rights and the right to exclude

Locke's idealised agrarian society was a transitory phase; the advent of the unstoppable capitalist/industrial age required a re-articulation of private property that stressed the primacy of individual exclusionary power and the right to exploit. The 'bundle of rights' metaphor gathered significant momentum in the late 19th century, in the process transforming modern property to conform to the economic imperatives of the new age.[28] The evolution of the bundle metaphor is described in the American context in the following terms:

> [I]n the nineteenth century, … property evolved from a unilateral and exclusive power over a material item, to a more malleable and divisible set of specific rights. Prior to the Civil War, property in the United States was generally viewed in terms discussed by John Locke…. After the Civil War, America's strong commitment to the Lockean view of ownership weakened, and our concept of property fragmented. The familiar "bundle of sticks" metaphor emerged, allowing society to treat rights as easily severable.[29]

The term 'bundle of rights' is often attributed to John Lewis' treatise on the law of eminent domain, published in 1888.[30] Stuart Banner's history of American property traces its first use to US Supreme Court Justice James Wilson in the late 18th century. The term was popularised by English law professor John Austin in the 1830s who lectured that property 'was not a thing a person owned…[but] the assemblage of rights a person had over a thing.'[31] Banner agrees that its use became mainstream by the 1880s, its 'definition had been

[28] Craig Anthony Arnold, The Reconstitution of Property: Property as a Web of Interests', (2002) 26 *Harvard Environmental Law Review* 281, 284-291.
[29] Fairfax, above n16, 16.
[30] Robert Goldstein, 'Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law', (1998) 25 *B.C. Envtl. Aff. L. Rev.* 347, 367.
[31] Stuart Banner, *American Property, A History of Who, Why and What We Own* (2011) 57.

repeated so often that American lawyers thought of property as a bundle of rights and no longer the thing itself.' [32]

The bundle envisages a series of divisible rights or sticks,[33] including rights to use and enjoy, exploit, alienate, possess, and of course, exclude. The fee simple holder arguably enjoys the greatest bundle of rights known to the common law, while a life estate holder has fewer sticks, deprived for example of full rights of alienation. The bundle metaphor highlights the divisibility of property rights, that rights can be separated and re-constituted in a flexible variety of right bundles. The metaphor also highlights the relativity of property, and the potential for the simultaneous ownership of divergent interests in the one land by multiple owners, 'ownership is not one aggregate right; it is many distinct rights, and a landowner can possess few or many of them.'[34] The metaphor suited the changing times because it enabled the right to intensively exploit. And inherent in the untrammelled right to exploit was a security of exclusive possession free from any interference. The absolute right to exclude captured the full value of private capital in land and was incentive for its efficient and intensive development. What was once qualified became absolute, conveniently building on the simple (yet incomplete) narratives of Blackstone and Locke.

This shift was most evident in Anglo-American common law. For example, in *Pennsylvania Coal Co. v Sanderson*[35] in 1886, the Pennsylvania Supreme Court (in keeping with a broader trend in American property jurisprudence in the late 19th century) affirmed the primacy of the right to develop and exploit. 'In *Sanderson*, the pendulum had completed its swing…from an agrarian property system that protected quiet enjoyment and enforced *sic utere tuo* firmly, … to the industrial property side, freely permitting intensive land uses with only modest concern about resulting harms…. Property law was now

[32] Ibid, 58. 'Even the dullest individual knows and understands that his property in anything is a bundle of rights.'
[33] Goldstein, above n at 367.
[34] Freyfogle, above n9, 19; Warren Samuels & Nicholas Mercuro,*The Fundamental Interrelationships between Government and Property* (1999).
[35] 113 Pa. 126 6 A 453 (1886).

chiefly about the right to use land for maximum gain.'[36] Private property was by this point firmly entrenched as a market commodity, a series of divisible and exploitable sticks, where values of personhood or community were obsolete. Integral to the maximal intensive use of land was freedom from all types of interferences, substantial or peripheral, guaranteed by the private stick to exclude, a new core right 'to halt physical invasions of … spaces - the right to exclude. This was the legal right that industries valued the most, because it allowed them to keep people off their lands.'[37]

The separable bundle also reinforced the *abstract* nature of private property rights. In the early 20th century, scholar Wesley Hohfield claimed there was no such thing as a legal right between a person and a thing, but merely between persons. In landmark articles in 1913 and 1917, Hohfield argued that property rights were 'multi-tal', a series of identical personal rights enforceable against a large indefinite mass of individuals. The Hohfeldian analysis successfully removed legal relations from the physical facts, such that 'land is not property, but the subject of property.'[38]

Its *abstract utility* meant that the right to exclude became the signature right amongst the other bundle rights. The U.S. Supreme Court described it as 'one of the most essential sticks'[39] or 'one of the most treasured strands in an owner's bundle of property rights.'[40] In 1954 Felix Cohen provided a simple formula for private property and its dominant right to exclude.

> [T]hat is property to which the following label can be attached:
>
> To the world: Keep off X unless you have my permission, which I may grant or withhold.

[36] Freyfogle, above n9, 73.
[37] Eric Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (2007) 56.
[38] Wesley Hohfield 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) *Yale LJ* 16.
[39] *Kaiser Aetna v United States* 444 U.S. 164, 177; *Dolan v City of Tigard* 512 U.S. 374, 384 (1994); *Nollan v California Coastal Commission* 483 U.S. 825, 831 (1987); 'The right to exclude others is perhaps the quintessential property right'. *Nixon v United States* 978 F.2d 1269, 1286 (D.C. Cir. 1992).
[40] *Loretto v Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435.

Signed: Private citizen

Endorsed: The state.[41]

American property jurist William Merrill is a leading contemporary advocate for private property's exclusivity thesis.

> The right to exclude others is a necessary and sufficient condition of identifying the existence of property. Whatever other sticks may exist in a property owner's bundle of rights in any given context, these other rights are purely contingent in terms of whether we speak of the bundle as property. The right to exclude is…fundamental to the concept of property. The right to exclude is a gatekeeper right that should be given primary place in defining property.[42]

Merrill castigates 'property realists' for their attempts to downgrade the significance of the right to exclude.'[G]ive someone the right to exclude others from a valued resource… and you give them property. Deny someone the exclusion right and they do not have property.'[43]

Yet by the beginning of the 21st century, disquiet over its unqualified pre-eminence increased, particularly when it impeded innocuous public access expectations. Jerry Anderson's comparative study of public access rights in England and the United States, criticised the U.S. Supreme Court for 'canonizing' this right, its placement of the exclude 'stick' at the 'top of the woodpile' without regard to context, community values, or norms.

> Completely absent from the Court's analysis is recognition that the landowner's right to exclude involves a balance with the public's interest in access. The public may desire access …for the purpose of reaching some communal property, such as a beach or park, or it may value access for its own sake, to enjoy the aesthetic values the private land and its surroundings

[41] Felix Cohen, 'Dialogue on Private Property', (1954) 9 *Rutgers Law Review* 357.
[42] Thomas Merrill, 'Property and the Right to Exclude', (1998) 77 *Nebraska Law Review* 730, 731.
[43] Ibid, 730.

> offers. While the public interest has figured into a few state court decisions on access, the Supreme Court has not so much as mentioned it in upholding a seemingly absolute right to exclude…. Rather than simply accept the right to exclude as a given, courts should carefully consider the interests it serves and determine whether, in some circumstances, it may be possible to accommodate greater public access without damaging the private owner's interests.[44]

Anderson criticises the arbitrariness of the right to exclude; that it monopolises the spatial spectrum of use without regard to the theoretical (or practical) consideration that other use(s) may peaceably co-exist. Anderson contrasts ancient English traditions about access to the countryside, with less entrenched American social and cultural values where primacy is placed on a landowner's private right to exclude.

Anderson's comparative study of public access to private countryside highlights that private property is a social institution, that its limits are defined and set by societal expectations and norms that vary from jurisdiction to jurisdiction and over time. 'Briton's… longed valued public access to the countryside'[45] combined with simmering 'class outrage[46] dating from the enclosure period, proved an irresistible impetus for the enactment of the *Countryside and Rights of Way Act* in 2000. This legislation clarified uncertainties and ambiguities surrounding public access rights, and opened up 'millions of acres of private land to public access, without compensating the landowners for this limitation on their right to exclude. As a result, the law represents a dramatic shift in the allocation of the bundle of sticks.'[47] By contrast, in the United States, and analogously Australia and New Zealand, the historical emphasis has focused on the role of private property as a secure and developable commodity, such that any experiments with property

[44] Jerry Anderson, 'Britain's Right to Roam: redefining the Landowner's Bundle of Sticks', (2007) 19 *Georgetown International Environmental Law Review* 375, 377- 379.
[45] Ibid, 412-417.
[46] John Sprankling et al, *Global Issues in Property Law* (2006) 90-93.
[47] John Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska Law Rev.* 739.

rights other than private have been transient[48] or peripheral.[49] The consequence in such jurisdictions, where the social and cultural context is less favourable, is that public access rights are weak and vulnerable.

However, a lack of legal formality is not to say that social pressures and norms in settler societies cannot exert inroads into a dominant right to exclude. Changed social attitudes to racial discrimination collided with the 'canonized' right to exclude, in the U.S. common law of public accommodations. Joseph Singer compared public accommodations laws across numerous U.S. states, in particular the rights of business owners to exclude customers on the basis of race. Singer's comparative analysis provoked generic observations about the right to exclude in private property jurisprudence

> What can the history of public accommodations law teach us about private property? It suggests that there are substantial limitations to the classical conception of property as ownership…It further suggests that all rights - even the basic right to exclude- are limited by the rights of others and by social interests… they also reflect and structure the contours of social relationships.[50]

Moreover, in terms of the sticks found in a standard 'bundle', Singer did not assume that automatically the right to exclude was a given,

> Yet if property involves a bundle of rights, it is not at all clear that all the sticks in the bundle fit comfortably together…The owner's right to exclude may…conflict with and may be limited by, the public's right of access to the market without discrimination…if the individual entitlements comprising ownership constitute a family of rights of a certain class, the members of the family do not necessarily get along with each other all the time.[51]

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[48] Freyfogle, above n 9, 23-24.
[49] John Page, 'Grazing Rights and Public Lands in New Zealand and the western United States: A Comparative Perspective' (2009) 49(2) *Natural Resources Journal* 403.
[50] Joseph Singer, 'No Right to Exclude: Public Accommodations and Private Property', (1995) 90 *Nw. U.L.Rev.* 1283, 1450.
[51] Ibid, 1452.

Interestingly, Singer argues that where a fee simple owner invokes the state's aid in enforcing trespass laws (presumably the common law of trespass enforced by court order), the private owner's interests inextricably overlap, or become 'imbricated' with those of the state[52], blending private and public, and diluting the absolutism of the right to exclude with legitimate interests of the state. More broadly, Singer concentrated on the overlooked sociability[53] of property, that it needs to be understood as both contingent and contextually shaped, and conversely that property helps to structure and shape the contours of social relationships.[54]

Richard Barnes likewise draws the nexus between property as a social institution, 'an institution that is responsive to the needs of society', and the limits of private property. Like Singer, Barnes does not automatically accept the right to exclude as paramount in terms of its absolute priority over other interests

> Although strong private rights may dominate many areas of property discourse, the prioritisation of private rights is not a logical requirement of property per se, but a product of the social context in which property rights have evolved… To narrowly construe property in 'terms of raw exclusory power' is to locate property in the hands of the past, not the present.[55]

Eric Freyfogle takes an historical rather than a normative perspective on this issue. 'To understand private property fully…we need to gain a sense of the path that private property has followed to get to where it is today.'[56] Freyfogle cites early public rights to unenclosed woodlands in the New England, grazing rights on rangelands, and customary hunting and fishing rights (the 'lost right to roam) to argue that exclusion has always been qualified.'[57] '[T]he right to exclude has not been absolute in American law, nor is it an inherent or

[52] Ibid, 1451.
[53] Margaret Davies, *Property Meanings, histories, theories* (2007).
[54] Ibid, 1462.
[55] Richard Barnes**,** *Property Rights and Natural Resources* (2009) 25-26.
[56] Ibid, 28. Freyfogle was more direct in a personal conversation with the author in April 2013, when he stated that we are 'clueless if we do not understand property history'.
[57] Freyfogle, above n37, 29-60.

necessary part of land ownership. Private ownership can function perfectly well with landowners possessing a limited right to keep outsiders away.'[58] Freyfogle believes the onus should shift. 'The right to exclude needs to be justified in terms of the common good, where it allows a landholder to halt disruptive intrusions, it is a valuable and justified right. But what about the right to exclude people who are merely passing across …land in ways that do not disrupt, do not invade privacy, and cause no physical harm?'[59] Freyfogle concedes that his arguments are unlikely to take root while lawmakers 'cannot imagine and do not remember a different [pre-industrial] legal world.'[60]

Parts 2, 3 and 4 illustrate that private property rights are not immutably fixed. Change is constant, but it is slow, and appears imperceptible. The apparent inability to 'remember or imagine a different legal world' to which Freyfogle refers is symptomatic of a wider malaise that affects private property, that it is not sufficiently cognizant of the dynamic of change. This is exemplified by the tenacity of the obsolete private/public divide. Dynamism, stasis, and the public/private divide, and their collective impacts on how we define private property in land, are canvassed in the succeeding parts 5 and 6.

5. The dynamism of private property

As a social institution, private property conforms to social, political and economic pressures. A multitude of scholars affirm its dynamism.[61] Hanoch Dagan writes of the dynamic 'public dimensions of private property'.[62] Joseph Sax describes property as 'continuously adjust[ing] to reflect new economic and social structures.'[63] Eric Freyfogle observes that '[p]rivate property… has

[58] Ibid at 57.
[59] Freyfogle, above n9, 250.
[60] Ibid, 60.
[61] Emma Waring, 'Private-Private Takings and the Stability of Property' (2013) 24 *Kings Law Journal* 237.
[62] Hanoch Dagan, 'The Public Dimension of Private Property' (2013) 24 *Kings Law Journal* 260.
[63] Joseph Sax, 'Property Rights and the Economy of Nature: Understanding *Lucas v. South Carolina Coastal Council*' (1992) 45 *Stan. L. Rev.* 1433, 1446.

been an evolving, organic institution with ownership rights that have varied greatly from era to era and place to place.'[64] And Jerry Anderson notes

> The recognition of private property interests involves trade-offs with community values and egalitarian goals; therefore, the exact composition of the bundle of sticks must be recognized as a mediation between these interests. Moreover, the balance struck is always tentative, subject to constant re-evaluation in light of current needs and norms.[65]

Yet the mantra that private property rights must be secure, certain, and stable[66] feeds a widely held counter view that private property rights are fixed and inviolate. The difficulty lies in understanding that stability can encompass change - indeed the latter enhances it. 'The very nature of a property regime demands that property be stable only relatively, not absolutely.'[67] Relative stability means principled evolution, the ongoing development of property principles and doctrines within coherent parameters, not *ad hoc* or unpredictable declarations of individualised 'justice'.[68] By contrast, absolute stability means no change at all, an ossified stasis that is an anathema to the incremental common law, the bedrock of property.

In coping with relative stability, and the relative certainty it enables, the challenge for the law is to remain simultaneously principled and contemporary. To borrow a Carol Rose aphorism that 'property is persuasion', the 'persuasion' needed to ground new or evolving property rights must be consistent with principles and precedent. As English Law Lord Millett observes

> Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is "fair, just and

[64] Freyfogle, above n9, 7.
[65] Anderson, above n44, 376-377.
[66] *National Bank Ltd v Ainsworth* [1965] AC 1175.
[67] Carol Rose, 'Property and Expropriation', (2000) 25 *Utah Law Review* 1, 14.
[68] Dynamic private property can be 'founded on a contextual application of normative judgment, [not] a decision-maker's subjective preferences.' Hanoch Dagan, *Property Values and Institutions* (2011) 43.

> reasonable." Such concepts, which in reality mask decisions of legal policy, have no place in the law of property.[69]

In the absence of principled balance, it is open to exploit Rose's aphorism, and the discourse of property generally, such that 'persuasion (becomes) property', a perverse reversal.

Property also retires 'obscure, neglected or outmoded' property sticks, and crafts novel 'off the rack' property rights to respond to societal demands.[70] Andrew Buck identifies the mid 19th century as an innovative period for Australian land law, when English rights unsuited to local conditions (for example primogeniture or the fee tail) were abolished, and new property regimes such as Torrens title were enacted.[71] In the early 21st century the propertisation of carbon poses like dilemmas, are ancient rights such as profits a prendre relevant to propertise sequestered carbon, or is a *sui generis* statutory right more appropriate.[72]

Private property in land maintains its relevance by being dynamic. Where its descriptions become stagnant or outmoded, its inaptness risks its integrity.[73] The private/public divide, and its universalisation of property rights as 'private', is a standout example of problematic definitional stasis.

6. The public/private divide

The public/private divide views 'property rights' as private individualised rights diminished or restricted by public regulation. The dichotomy is relatively simple; the right to develop or exploit land is a natural private right, an incident of owning land. Public restraints on that private right are not an incident of the

[69] *Foskett v McKeown* [2000] 1 AC 112, 127 per Lord Millett.
[70] Carol Rose, 'What Government Can do for Property (and Vice Versa)' in Warren Samuels and Nicholas Mercuro (eds.), *The Fundamental Interrelationships between Government and Property* 211; Charles Reich, 'The New Property', (1964) 73 *Yale L.J.* 733.
[71] Buck, above n19.
[72] Samantha Hepburn, 'Carbon Rights as New Property: the benefits of statutory verification', (2009) 31(2) *Sydney Law Review* 239.
[73] Dagan, above n68, 43.

private right, but an overarching regulation or impediment sourced from a detached public realm.[74]

The consequence of the public/private divide is that property is exclusively within the private realm, and a matter for the private law. Public 'interests' in property constitute a restriction or encumbrance on the private right, imposed from the other side of the divide. Public interests in property are therefore not 'property rights', since 'rights' belong only in the private realm. Conceptually the dichotomy emphasises simplicity over complexity, and duality over plurality. Property is either private, or it is not. And the concept that private, public or common rights may subsist simultaneously in a given parcel is the antithesis of the clean duality.

The origins of the public/private divide stem from the late 19th century, rising in tandem with the bundle of rights metaphor and an urban/industrial intensification of land use. Freyfogle writes

> By late century evolving legal thought had come to portray American life as separated into two spheres: a private sphere and a public, governmental sphere. Private property was placed in the private category…. Regulation, by contrast was a public governmental act…. the mere fact that legal rhetoric divided the public and private realms represented a critical shift in thinking, a shift that would have far-ranging implications up to our day.[75]

The quarantining of property into the private realm set the scene for later conflicts over the ostensible loss of private property rights as environmental and planning regulation encroached into the private owner's bundle of rights. The conflation of private ownership into a form of allodial or absolute ownership was fed by the noeticism of the sole and despotic dominion mantra in a purely private environment.[76]

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[74] *Kelo v City of New London* 125 S. Ct. 2655 (2005).
[75] Freyfogle, above n9, 80.
[76] Freyfogle, above n37, 20-24.

In particular the divide reinforced the ideology that property was solely concerned with the promotion of personal economic welfare and the protection of individual privacy. Land was no longer a part of an inclusive compact rooted in context or community; rather private rights were an exclusive, autonomous abstract. 'As an intellectual concept, private property had largely been freed from communal obligations in a way that both reflected and fuelled the breakdown of community-centred sentiment.'[77] The public/private divide also proved the catalyst for the 'curious' modern myopia[78] that 'property' and 'private property' are one and the same, even where alternatives to private property are patently 'ubiquitous, if unremarked'.[79] Carol Rose cites economic and social reasons for this contemporary unwillingness to see property other than private property.

Hanoch Dagan is critical of the polarities of the public/private divide. The private law of property 'cannot and should not have its own inner intelligibility.'[80] Rather it is a series of related 'institutions' with varying 'public dimensions', dependent on public factors such as social context, human relationships, and the nature of the propertied resource. In Dagan's account, private property 'rests on a pluralist view of society'[81] and correspondence to its grounded truth. In terms of the right to exclude, Dagan identifies three public values that qualify the right; autonomy, personhood and community.

> None of these values sanctions an absolute right to exclude; furthermore, to varying degrees, they even positively require curbing such a right and recognising the right to entry of non-owners.[82]

Autonomy arises where non-owners or marginalized groups enjoy limited rights of entry; a qualification that serves their independence and sustains human dignity. Equally a qualified right to enter may be constitutive of a non-

[77] Freyfogle, above n9, 81.
[78] Carol Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems', (1998-1999) 83 *Minn. L. Rev.* 129, 132.
[79] Ibid, 132.
[80] Dagan, above n62, 270.
[81] Ibid, 262.
[82] Ibid, 284.

owner, a furtherance of *personhood*, particularly where the owner's property is merely fungible. Lastly Dagan says that qualified rights to enter serve public values of community, by creating 'institutional infrastructure' that fosters co-operation and the attainment of human flourishing.[83]

The public/private divide is a late 19th century construct, an artifice detached from both present and past. For centuries, private freehold estates have been subject to wide restrictions that collectively represented an amorphous public interest in land. Feudal or Crown obligations were the hallmark of the doctrines of tenure and estates. The fee socage tenure that prevailed after the *Tenures Abolition Act of 1660* remained an estate of uncertain duration, capable of reversion to the Crown through escheat. Natural rights of support, air, and light modified landowner's rights since time immemorial, while common law doctrines of prescription and adverse possession acknowledge the relativity of a landowner's title, and the supervening interests of third parties in private property. Since the 17th century, the vesting of future interests in land has been subservient to the public interest in freedom of alienation, enforced by the rule against perpetuities. Private property in the common law tenurial tradition has rarely been absolute. Arguably it is less so now, as land use and environmental regulatory laws intersect with property with increasing frequency and sophistry.

In the 21st century, the notion of a pure private/public dichotomy is even less defensible. Joseph Sax says it was dated in the 1970s, when high profile cases such as *Just v Marinette County,* and *Penn Central*[84] legitimised the subsistence of public rights in private property without the former constituting the 'taking' of a private property right. Rather, such cases exemplify that the private/public divide is porous[85] and that any former distinctiveness (real or perceived) is blurred. Private property rights are burdened with public

[83] Ibid, 285-6.
[84] Joseph Sax, 'Some Thoughts on the Decline of Private Property' 58 *Wash. L. Rev.* 481 (1982-1983); *Penn Central Transportation Co. v New York City*, 438 U.S. 104 (1978).
[85] Ann Brower et al, 'The Cowboy, the Southern Man, and the Man from Snowy River: The Symbolic Politics of Property in Australia, the United States and New Zealand', (2009) 21(3) *Georgetown International Environmental Law Review* 455.

restraints and public interests proliferate,[86] while public and private rights co-mingle in public lands.[87] We have moved from perceptions of transparent dichotomies, to realities of translucent blends. This progression has not passed unobserved.[88] Margaret Davies states that 'the distinction between public and private…is not a bright line.'[89] Kevin and Susan Gray see public and private operating, 'not dichotomously, but continuously across a spectrum in which adjacent connotations shade easily into one another.'[90] Amnon Lehavi describes modern property as a 'conscious jigsaw puzzle [where]…the boundaries between the public and private realms are not clear-cur nor hermetic…the two spheres are sophisticatedly intertwined."[91]

Yet despite these (and other similar) observations, the common law 'has not uniformly incorporated or internalised this understanding of the deep structure of property' and continues to 'articulate the notion of property in terms of raw exclusory power.'[92] The primacy of the right to exclude is directly correlative of the rhetorical primacy of the public/private divide, yet the latter is a flawed and unrepresentative dichotomy. The arbitrary right to exclude is wedded to an outmoded concept. 'The ideology of property as uncontrolled exclusory power is nowadays just as untenable as is the dichotomous distinction between the domains of the private and the public.'[93]

This mismatch is highlighted when public rights of access intersect with the right to exclude. Security of private use invariably requires freedom from interference, but a blanket position is not always accurate, it depends on context, geographic, historic and cultural. The importance of context is

[86] Richard Babcock & Duane Feurer, 'Land as a Commodity "Affected with a Public Interest"', (1976-1977) 52 *Wash. L. Rev.* 289.
[87] Brower et al, above n85.
[88] Courtney White, 'Conservation in the Age of Consequences' 48 (2008) *Nat. Resources J.* 1, 3-4.
[89] Davies, above n53, 11.
[90] Kevin Gray & Susan Gray, 'Private Property and Public Propriety' in *Property and the Constitution* (Janet McLean ed.) (1999) 11.
[91] Amnon Lehavi, 'The Property Puzzle' (2008) 96 *Georgetown Law Review* 1987.
[92] Gray & Gray, above n90, 13.
[93] Ibid, 15.

exemplified by countryside access legislation in England and Scotland.[94] The risk of having an absolutist, arbitrary starting point when defining private property is that it ignores such social context, and disregards the different types of property to which it may relate. Kevin and Susan Gray describe this 'prerogative' of property as 'both total and totalitarian.'[95] Perhaps a more appropriate metaphor for its re-evaluation is Kevin and Susan Gray's 'spectrum' where 'connotations of public and private shade easily into one another', one inherently defined by its lack of any artificial divide.

7. The 'plausible' narrative of private property

The tenacity of the public/private divide and the primacy of the right to exclude has entrenched a 'plausible', yet narrow narrative of private property that airbrushes away inconvenient truths, historic and contemporary. In the 17th and 18th centuries, Locke and Blackstone recognised the significance of qualification and context. In the 21st century, limitations on the right to exclude have increased in number and scope, as statute expands its reach. But as Freyfogle instinctively surmises, the force of this curiously detached narrative is likely to endure while ever lawmakers 'cannot imagine and do not remember' a different, diverse legal world. As a result, private property holders continue to enjoy

> an unqualified prerogative to determine – no matter how arbitrarily, selectively, or capriciously - who may have access, and on what terms, to his or her land…An ancient territorial imperative accordingly receives the supportive sanction of the law…For the most part the common law engages in no subtle gradation of the exclusory powers inherent in ownership; the rule of peremptory exclusion makes no distinction between the species of property to which it may relate.[96]

[94] *Countryside and Rights of Way Act 2000* (UK); *The Land Reform (Scotland) Act 2003* analysed in Lovett, above n47.
[95] Gray & Gray, above n90 15.
[96] Ibid, 14.

Absolute, arbitrary and capricious exclusion has also proved enduring because it is part of a generally positive story about private property. Carol Rose's normative view of property is strongly influenced by her earlier career as professor of English literature. She wrote in 1990

> The existence of a property regime is not predictable from a starting point of rational self-interest; and consequently from that perspective, property needs a tale, a story, a post-hoc explanation. That…is one reason Locke and Blackstone…are so fond of telling stories when they talk about the origin of property. It is the story that fills the gap in the classical theory…that makes property "plausible".[97]

In settler societies, much of the property narrative stems from a formative nation-building era, when the settlement of empty hinterlands was a political imperative. Thus possession is the origin of property, landowners should not sleep on their rights, the law rewards the productive use of land,[98] and so forth. All tend to justify questionable title[99], to assuage Blackstone's self-doubt or 'ownership anxiety,' and serve to make the arbitrary exclusiveness of private property plausible as the key to a wider story.

However, what if the dominant narratives of private property were those of Blackstone's self-deprecation rather than despotic dominion? How different would our defined understanding of private property be? There is no definitive answer to such rhetorical questions. However the continuing 'felicity'[100] of private property's 'plausible narrative' can be examined from an alternative perspective, by ascertaining the strengths of a *pluralistic* private property, and re-evaluating the rationales for the modern right to exclude in such a pluralistic context. Parts 8 and 9 address each of these tasks in turn.

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[97] Carol Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory', (1990) 2 *Yale Journal of Law & the Humanities* 37, 52.
[98] Brower et al, above n85.
[99] Rose, The Moral of Property, above n6.
[100] Nicholas Blomley, 'Performing property, making the world' at http://ssrn.com/abstract=2053656.

8. Attributes and propensities of private property in land

If we are to escape an all-consuming exclusionary view of private property in land, *exclusivity* must be seen in the context of the institution's other co-existing (yet under-regarded) characteristics. This part 8 identifies *security of use, clarity* and *durability* (as well as a redefined *exclusivity*) as critical attributes of private interests in land. The quality of *dynamism*, already traversed in part 5, could likewise be added to this list.

There is no unanimity about the precise content of private property rights. Tony Honore describes 11 'incidents' of property ownership – 'the right to possess, the right to use, the right to manage, the right to the income of a thing, the right to the capital, the right to security, the rights or incidences of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity.'[101] Anthony Scott discerns fewer - six 'characteristics' of exclusivity, duration, flexibility, quality of title, transferability, and divisibility.[102] Curiously, neither Honore nor Scott identifies the right to exclude.

This omission is perverse given that the right to exclude has become the defining incident of modern private property, a process Richard Barnes describes as a 'thinning out' of private rights, a hierarchical ordering where excludability is at the top of the qualitative 'woodpile'.[103] Thomas Merrill and Henry Smith say that exclusivity,[104] in particular the presence or not of the right to exclude[105] is private property's *sina qua non*.[106] What other presently existing yet under-regarded rationales could explain the 'propertiness' of a private thing, such that we can digress from this definitional closed loop?

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[101] A.M. Honore, "Ownership' in *Oxford Essays in Jurisprudence*, (A G Guest ed., 1961) 107, 113.
[102] Anthony Scott, *The Evolution of Resource Property Rights* (2008); Anthony Scott, 'Development of Property in a Fishery', (1988) 5 *Marine Resource Economics* 289.
[103] Anderson, above n44.
[104] Thomas Merrill and Henry Smith, 'The Morality of Property' (2007) *William & Mary Law Rev.* 1849, 1850
[105] Merrill, above n42, 748.
[106] Merrill and Smith, above 104, 1850.

It is submitted that the quality of private rights turn on a plurality of characteristics - the *security* and *exclusivity* they offer their individual holder, and their more generic *clarity* and *durability*. The latter attributes of clarity and durability remain the same desired qualities that 19th century settlers sought in response to the equivocal and vulnerable common rights they left behind in their metropolis, a phenomenon that continues to inform the narrative of private property in settler societies.

In terms of *security*, private property delivers the benefits of secured and assured title. Secure title provides the holder with the requisite (self) confidence to invest in the right over the long term. Assurance of title is the institutional guarantee the state provides private property.

> Assurance of property rights refers to institutional support for systems of creation and enforcement of property rights. Assurance of property rights differs from the security of property rights in that assurance refers to the general political and legal environment in which those rights exist. In contrast security…refers to characteristics of specific rights. Secure rights are those which the owner is not in danger of losing.[107]

Consider the core private rights. The right to possess is a secure right, assuredly enforced by remedies premised on interferences with possession, and a common law conception of property that is one of possession not ownership.[108] The right to use and enjoy is likewise secure, there is no compulsion to share private use rights, individual use is certain, and is capable of whole or part transfer to others. The right to exclude, as previously discussed, is 'absolute, arbitrary and capricious', and as a result of such excess, is excessively secure. Rights can be *secure* (in the sense that the right is not in danger of loss) without the added requirement of untrammelled freedom from interference. By shifting the focus from exclusive dominion to secure use, security of title remains unaffected. Of course, there are

[107] Doris Fuchs, *An Institutional Basis for Environmental Stewardship The Structure and Quality of Property Rights*, (2003) 67-68.
[108] Sarah Green and John Randall, *The Tort of Conversion* (2009) 80-81; Kevin Gray & Susan Gray, 'The Idea of Property' in *Land Law Themes and Perspectives* (1998) 21.

circumstances where security of title is best guaranteed through exclusion, but not automatically so. Equally, there are 'large slabs' of property law that would cease to exist if exclusion was private property's sole organising principle.[109] As Hanoch Dagan surmises, property rights depend on social context, human relationships, and the nature of the resource itself, not its purported exclusivity.[110]

Thus *exclusivity* is a conundrum. Exclusivity has been largely construed through the private/public prism of 'raw exclusory power', and an extreme interpretation of the term 'exclusion.' The latter is what Larissa Katz calls 'proponents of the boundary approach trading on an ambiguity in the meaning of "exclusive"'.[111] 'Exclusivity' has subtler, less absolutist meanings, a point clearly made by Katz. 'There is a distinction between a right that is exclusive in the sense that it has the function of excluding others from the *object* of the right and one that is exclusive in the sense that its holder occupies a special *position* that others do not share.'[112] Anthony Scott likewise illustrates its nuances, describing 'exclusivity' as a freedom from interference in the valid exercise of the right, not necessarily a right to keep all others out. Such 'interferences' may come from adjoining landowners (spill over problems) or governments (by regulation).[113]

> [R]ight holders need exclusivity to be independent - to free themselves from losses and costs. Exclusivity has two distinct meanings; freedom from interference with having to share a resource with others; and freedom from government regulation that restricts the ways he can use the resource in order to promote the public good.[114]

[109] Hanoch Dagan, 'Property and the Public Domain' (2009) 18 *Yale Journal of Law and the Humanities* 84, 85-6
[110] Dagan, above n68.
[111] Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) *Univ. of Toronto Law Journal* 275, 277
[112] Ibid.
[113] Jonette Watson Hamilton and Nigel Bankes, 'Different Views of the Cathedral: The Literature on Property Law Theory' in A. McHarg et al eds*, Property and the Law in Energy and Natural Resources* (2010) 26.
[114] Anthony Scott, *The Evolution of Resource Property Rights* (2008).

The freedom from having to share a resource with others is patently achieved by the raw exclusory power of an arbitrary right to exclude. But equally it is achievable through a secure and exclusive right to use, a 'special position'[115] reserved to the holder and therefore free from neighbourly interference in the exercise of its use. This latter interpretation is consistent with Freyfogle's notion of a qualified right of freedom from interference, rather than an absolute right to exclude. It is also consistent with a view of private property as regulating access to and exclusive use of scarce resources. Private property's attribute of *exclusivity* feeds the propensity for private rights to overwhelm or dominate property discourse generally, but it is the slanted interpretation of 'exclusion' to equate to 'raw exclusory power' that triggers this inherent propensity to conflate.

If the strengths of private property rights lie in their clarity, durability, security and exclusivity (howsoever the latter is construed), then private property's propensity to dominate wider property discourse is its inherent institutional flaw. This encroachment is well illustrated when seen in the context of private rights in public resources.

> Private rights in public resources have a propensity to encroach into the public domain, and privatize residual rights and interests lacking legal certainty or definition. The corollary of this tendency is the suppression of any latent public rights in the public resource. However where the nature and extent of both private and public rights are clearly and transparently defined, there is less scope for the private right to over-reach and a commensurately greater scope for public right(s) to subsist and prosper.[116]

The tendency for private rights to fill and expand the vacuum of legal uncertainty reduces the chances for a 'mosaic'[117] of private and non-private rights to co-exist simultaneously in a multiple use context. Its conflation arises

[115] Katz says that ownership of private property is not so much about exclusion, but 'a special position to set the agenda about the use of a resource.' Katz calls the former the 'boundary approach', an approach that 'fails to explain the true significance of much of property law and property-related tort law to the creation and preservation of the owner's special position.' Katz, above n111, 278.
[116] Page, above n49.
[117] Fairfax et al, above n16.

from a convergence of influences traversed to date in this chapter, the settler narratives of private property, the private/public divide, and the pre-eminence of raw exclusory power in defining exclusivity. This 'conflation propensity' flourishes when the scope and ambit of property rights, non-private and private, are weak or ill defined.[118]

9. Modern justifications of the right to exclude

In a pluralistic understanding of private property, the right to exclude must be justified by reasons other than its own self-assertion. The *economic* rationale for the right to exclude is a logical starting point. It is logical because the right to exclude originally rose to prominence as private property adjusted to an expanding industrial economy, re-configuring itself into the familiar bundle of rights. Freedom from any interference, substantial or peripheral, secured the maximum economic advantage for the landowner, rather than the less assertive right to quiet enjoyment. However the pursuit of untrammelled economic expansion is no longer an overriding imperative. Indeed there are parallels between the fading economic justifications of the right to exclude and the antiquated rationales for the private/public divide. In the early 21st century, environmental concerns occasionally trump the 'good' of economic growth. The need to imbue property with an environmental ethic[119] is an equally desired and expanding public good. Moreover, secure rights of use and enjoyment are now equally effective in delivering the economic 'goods' of prosperity or growth, suggesting that the late 19th century monopoly that exclusion once enjoyed is past.

There is also a *moral* justification for the right to exclude. Thomas Merrill and Henry Smith argue that 'morally grounded exclusion rights [subsist] at the

[118] Conflation can be seen in the NZ high country, where a private right of pasturage in Crown pastoral tenure lacked an explicit right to exclude, and the public right of access was weak and diffuse. The private right ultimately expanded into a quasi-freehold estate, eliminating any residual public interests in the land, A Brower & J Page, 'Trespassers W…, ' (2012) 42 *Environmental Law Reporter* 12 555. Only the public footpath is seen as the counter-example to this conflation propensity, Nicholas Blomley, *Rights of Passage Sidewalks and the regulation of public flow* (2011).

[119] Carol Rose, 'Given-ness and Gift: Property and the Quest for Environmental Ethics' (1994) 24 *Envtl. Law* 1.

core of property.'[120] Enforceable property rules require widespread respect and support, and as such they must be 'grounded in robust moral notions that are easy to communicate and shared by the relevant members of the population.'[121] The importance of protecting possession against unwarranted intrusion, the priority accorded to those 'first in time', and the protection of property itself as a moral good, are proffered as moral justifications for the right to exclude. In support of the latter, the authors cite scenarios such as intentional trespass, 'bad faith' adverse possession, and 'takings' for economic development[122] as examples of moral outrage engendered by 'taking from the innocent and distributional injustice'.[123] Shramkrishna Balganesh justifies the right to exclude by the moral norm of inviolability.[124] He describes the right as 'a normative device, which derives from the norm of resource inviolability…the right to exclude operates as an analytic tool, which seeks to transplant the norm of inviolability from morality to law.'[125] Importantly the right is seen as 'the correlative of the duty to keep away from a resource over which the norm applies.' The example of cars parked and locked on the street is used to illustrate the norm; we keep away from locked vehicles (unless acting criminally) because we adhere to a societal norm respecting the inviolability of someone else's resource. Yet conversely, Hanoch Dagan describes the morality of exclusion as 'normatively disappointing',[126] an account that fails to reflect the reality of an owner's social responsibilities, or a non-owner's limited rights of entry.

Morality, like private property, is dynamic; it is not frozen in time. What if public sentiment shifts about what is morally deserving of protection, or what is inviolate? To adopt a well-used example, the taking of 'innocent' public access rights could become Merrill and Smith's 'moral outrage'. If so, 'distributional injustice' may turn on its axis and the morality tales of

[120] Merrill & Smith, above n104, 1852.
[121] Ibid, 1855.
[122] Ibid, the authors cite the 'controversy' over the decision in *Kelo v City of New London* 125 S. Ct. 2655 (2005) as being based on basic moral intuitions.
[123] Ibid, 1880.
[124] Shramkrishna Balganesh, 'Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions', (2008) 31 *Harvard Journal of Law & Public Policy* 593.
[125] Ibid, 600.
[126] Dagan, above n68, 44.

unwarranted intrusion or inviolability may fall away or lose resonance when privileged private interests collide with legitimate public ones. In such cases, the morality of inclusion, not exclusion, could deliver the public good desired.

Another powerful justification for the right to exclude is that it is the *origin* of property rights; all other rights are derived or sourced from the right to exclude, the 'first right argument'. Thomas Merrill explains it as one of logical primacy

> If one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property through the addition of relatively minor clarifications about the domain of the exclusion right. On the other hand if one starts with any other attribute of property, one cannot derive the right to exclude by extending the domain of that other attribute, rather one must add the right to exclude as an additional premise. This mental exercise strongly suggests that the right to exclude is fundamental to our understanding of property.[127]

However the argument is not universally logical. There are important property rights where the right to exclude is irrelevant, an easement is one example. Easements include rights of footway, and are non-possessory incorporeal rights that permit the use of another's resource in a sanctioned way. The right to exclude is not the basis of an easement right; rather it is the antithesis of the easement's ongoing subsistence. Nor is the right to use and enjoy particularly grounded on exclusion, use rights exist in common property where the right may be shared by many community members. Carol Rose also sees it differently,' she argues that the *right to possess* deserves first right status. [128] Moreover possession and exclusion are also not always inextricably linked. Rather the notion of possession of land in the Anglo common law tradition, dominated by the combined effects of the doctrines of estates and tenure, is a nuanced, technical one. Mark Wonnacott clarifies that the term 'possession' of land is used in a number of ways, but the proper or technical

[127] Merrill, above n42, 740.
[128] Carol Rose, 'Possession as the Origin of Property', (1985) 52(1) *Univ. Chicago Law Rev.* 73.

meaning describes an abstract relationship between a person and a corporeal estate.[129] '[P]ossession in this sense describes a relationship between a person and a corporeal estate in land (a fee simple, a lease…) rather than the relationship between a person and any physical feature of the land.'[130] Like its once dominant economic rationale, exclusion no longer enjoys monopoly status as the universal origin of all property rights.

Conversely, there are reasons why the right to exclude should be qualified. The history of property, and the private estate's *dynamism* suggest that an exclusivist, land as commodity version of private property is merely a present iteration, not a timeless, fixed one. Indeed the high water mark in its current form may have already passed. Historical precedents suggest that private property takes many forms, like Freyfogle's 'settled agrarian' model, where private, public or common rights co-existed with a private owner's (more qualified) right to quiet enjoyment, and 'the rights of one landowner [we]re necessarily constrained by the rights of neighbors, [the] right to quiet enjoyment, [the] right to remain undisturbed.'[131] Freyfogle posits that this era may return in an environmentally informed future, a 'modern, ecologically informed variant of the agrarian property regime of the late 18th century.'[132] This view of property sees a heightened place for private use, '[p]erhaps we need to apply more broadly the idea that all of nature remains in a sense in public hands, with private owners receiving only prescribed rights to use.'[133] Such ideas are an anathema to dominion-centric notions of exclusive possession.

Similarly, long established doctrines that protect the interests of third parties, as well as the widespread intervention of statute, also erode absolute exclusive possession. The doctrine of prescription, relying on practices going back to time immemorial, creates new third party property rights 'where a

[129] Mark Wonnacott, *Possession of Land* (2006) 1-18.
[130] Ibid, 2.
[131] Freyfogle, above n9, 16-17.
[132] Ibid, 94.
[133] Freyfogle, above n38, 141.

court finds long, open and uninterrupted use'[134] of another's private land. Legislatures also find little compunction in diminishing the right to exclude if it is convenient for the purposes erecting a dividing fence, sanctioning an encroachment, or trimming overhanging branches from trees.[135] Such limitations on the right to exclude, whether sourced from ancient common law doctrine, or recent legislation, corroborate the more general thesis that other private, public or communal rights or sticks may exist in a parcel of private property. Joseph Sax describes this as 'qualified private ownership'. He argues by analogy that

> a more accurate picture of property use is suggested by an example in which a number of owners each claims a right of use in a common resource such as a lake or a common grazing field. The rights of each user can only be defined with reference to the claims of other users, and there may be incompatibilities not subject to solution by simply parcelling out the resource in equal shares.[136]

Another analogy through which one may *see*[137] qualified private ownership is that of a water-based (rather than a land-based) paradigm.

> When we think about water, then, we are forced to cast aside all of our reassuring, but ultimately confining, notions about what it means to own private property. Indeed, the law of surface water today, at least in California, bears little resemblance to our traditional conception of property. Autonomous, secure property rights have largely given way to use entitlements that are interconnected and relative…Private property in the coming decades, like water today, might well exist principally in the form of specific use-rights.[138] ….Once we begin to focus on specific use-rights, we may begin to question many existing property arrangements: Should I not be able to paddle down your stream if I leave your activities undisturbed? Can I

[134] Peter Butt, *Land Law* (6th ed, 2010) 470.
[135] Access orders can be made by courts, effectively qualifying the private owner's right to exclude, *Access to Neighbouring Land Act 2000* (NSW).
[136] Joseph Sax, 'Takings, Private Property and Public Rights' (1971-1972) 81 *Yale L.J.* 149,154.
[137] Rose, above n2.
[138] Eric Freyfogle, 'Context and Accommodation in Modern Property Law', (1988-1989) 41 *Stanford L. Rev.* 1529, 1530.

> seek petition signatures in your shopping center if I do not disrupt your patrons? [139]

The once dominant 'plausible narrative' of 'despotic dominion' is not the only narrative of private property. There are many alternative, incommensurable accounts and rationales that affirm private property as a pluralistic institution. As Dagan observes, 'the pluralism of private property reflects the heterogeneity of [its] real-life manifestations.'[140] Ultimately, the ambit of the modern right to exclude is 'justified only when it contributes to the common good…If property is legitimate only when it promotes the common good, and if ideas about the common good shift, then the rules of ownership ought to shift along with them.'[141]

10. Conclusion

This chapter argues that private property affects how we 'see' property in land because of its disproportionate emphasis on an absolute, arbitrary right to exclude, leading to a modern myopia that 'property' and 'private property' are synonymous. We have been seduced by the noetic writings of Blackstone and Locke and the pedagogical elegance of the bundle of rights, in the process overlooking or forgetting that private property is a social institution moulded and informed by change and context. We have also overlooked the relatively recent history of private property, and ignored the evidence that the public/private 'divide' is more a graded spectrum of degree than an undivided dichotomy.

Private property is critical in so many respects; it serves the 'public good' by providing secure title that enables certainty and stability in property, and its efficient exploitation forms the basis of economic prosperity. Its narratives reward the productive use of land. But the security of title and economic prosperity that it engenders do not necessarily rest on an arbitrary right to

[139] Ibid, 1551.
[140] Dagan, above n68, xii.
[141] Freyfogle, above n37, 20, 26.

exclude. The justifications for an unqualified right to exclude are not beyond critique. The extent to which the all-consuming right can be modified to allow a more nuanced freedom from interference permits the theoretical ‘oxygen’ for other rights (private, public or common) to subsist and co-exist. In many cases, the net practical effect may be the same, particularly in densely populated cities. However by articulating a revised private property that acknowledges that property is relative, and supersedes an obsolete public/private divide, the possibility to ‘see’ property across human landscapes in all its forms is enhanced, substituting singular use for multiple uses, and critically, private uniformity for property diversity.

Chapter 2 Towards an Understanding of Public Property

1. Introduction

Public property in land is remarkable for its unremarked ubiquity, obvious to identification, yet oblivious[1] to coherent understanding. While richly embroidering human landscapes, we remain pauperized by the public estate's theoretical under-development. [2] As American scholars Sally Fairfax and Jon Souder observe, '[t]he flourishing literature concerning property…is little reflected in the debate surrounding U.S. public resources. Discussions of public lands - our national parks, forests, wildlife refuges, and grazing districts - has been surprisingly unconcerned with theories of property, access and ownership.'[3] Leigh Raymond concurs, noting the surprising absence of property rights from the public lands 'conversation'.[4] This chapter agrees. It argues that public property in land exists, but that it is under- recognized (and indeed often unseen) because of the dominance of the private paradigm. This chapter sets out to reveal the extent of the public estate in our midst, to legitimize and thereby normalize the already existing place of public real property in a diverse property mosaic.

Part 2 commences with a brief definition of public property in land. Part 3 then reviews the spectrum of public property type, from corporeal to incorporeal, and beyond to custom and illusion. Part 4 aims to identify public property's proprietorship. The conundrum of 'who owns public property' and in what capacity, are vexing, inexact issues. Part 5 scrutinizes *inclusion*, its elusive, unconsummated relationship with access, analogies to use and enjoyment,

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[1] Carol Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems', (1998-1999) 83 *Minn. L. Rev*. 129, 132.
[2] 'There is little written about public property…except in contradistinction to private property." J.W. Hamilton & N. Bankes, 'Different Views of the Cathedral: The Literature on Property Law Theory' in A. McHarg et al eds *Property and the Law in Energy and Natural Resources,* 19-20 (2010).
[3] Jon Souder and Sally Fairfax, 'In Lands We Trusted: State Trust Lands as an Alternative Theory of Public Ownership', in Charles Geisler and Gail Daneker eds, *Property and Values: Alternatives to Public and Private Ownership* (2000) 89.
[4] Leigh Raymond, 'Sovereignty Without Property? Recent Books in Public Lands', (2003) 43 *Nat Res. J.* 313, 315.

and how it facilitates property as propriety. Part 6 concludes with a call for greater sophistry in public property discourse.

As Fairfax and Raymond intimate, scrutiny and analysis of public property in land is overdue. To myopically overlook the public estate is to consign its values and meanings to the periphery. Conversely, to better "see"[5] the diversity of public property in land is to dispel the corrosive implication that it is at one extreme, an oxymoron,[6] or at the other, a perverse variant of private ownership.[7] To better understand public property is to make clearer sense of what is ours.

2. Defining public property

Public property is frequently defined by what it is not; property that is *not* private property, a residual and counter-contextual explanation.[8] Common property is arguably better understood.[9] The public estate suffers the paradoxical risk that it is non-property, a passive *res* awaiting capture.[10] As Margaret Davies argues, 'within the liberal context, the private nature of property is naturalised and universalised, as though other forms are somehow less ethically defensible.'[11] Centuries of marginalization of non-private property, dating from the enclosure period,[12] have obscured public property; it's 'seeing' dispersed and drowned out by private rhetoric.

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[5] Carol Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (1994).
[6] Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, (1986) 53 *U. Chi. L. Rev*. 711.
[7] Merrill dismisses public property as a variant of private property, the only difference being that a state agency holds the right to exclude 'stick' instead of a private holder. Thomas Merrill, *Property and the Right to Exclude*, (1998) 77 *Nebraska L. Rev.* 730; Kevin Gray & Susan Gray, 'Private Property and Public Propriety' in Janet McLean (ed.) *Property and the Constitution* (1999), 13
[8] Ann Brower, *Who Owns the High Country?* (2008).
[9] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990); Hanoch Dagan & Michael Heller, 'The Liberal Commons' (2000) 110 *Yale Law Journal* 549, 558.
[10] Blomley describes public property as being 'bereft of property, a terra nullius'. Nicholas Blomley, 'Enclosure, Common Right and the Property of the Poor' (2008) 17 *Social & Legal Studies* 311, 321.
[11] Margaret Davies, *Property meanings histories theories* 13 (2007).
[12] Carol Rose, 'Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age', (2003) 66 *Law & Contemporary Problems* 89, 91.

To define public property is to jettison the familiar private paradigms of exclusion and alienability. By necessity, it is to embrace that property is 'not a monolithic notion of standard content and invariable intensity [but] the most comprehensive of all the terms which can be used… indicative and descriptive …of all or any of the very many different kinds of relationship between a person and a subject matter.'[13] For narrative purposes, public property is defined as the sum of 'interests [in land] in which the individual concerned has no greater claim than any other member of the public,'[14] collective rights, enjoyed by individuals in common with others, and measured by their public sum.

This chapter expands on this preliminary definition by identifying three indicators of public property in land: the diversity of its type; the conundrum of its ownership; and its right of inclusion. Each attribute amplifies further comprehension; type expands recognition; ownership exposes the fault line between property's collective and individual values, while inclusion represents the hope of a nascent touchstone right, presently ill formed and amorphous.

3. The spectrum of type

Public property in land takes a plethora of form. This part seeks taxonomic order by adopting a blunt categorization familiar to property lawyers, corporeal versus incorporeal. Corporeal public property refers to tangible, identifiable lands. Incorporeal public property comprises non-possessory, intangible, less than fee interests in land. The study of type then diverges to examining the sources of public property beyond statute and the common law, those of custom, even illusion.[15]

Traditionally seen as 'government-owned' land, the spectral breadth of public property type demonstrates both a surprising diversity, and a refutation of any

[13] *Yanner v Eaton* (1999) 201 CLR 351
[14] *Stow v Mineral Holdings (Australia) Pty Ltd* (1977) 51 ALJR 672, at 679.
[15] John Merryman, 'The Public Interest in Cultural Property', (1989) 77 *Cal. L. Rev*. 339, 341; Laura Underkuffler, *The Idea of Property: Its Meaning and Power* (2003) 110.

distinct public/private divide in property. Rather public property occupies space across a broad continuum, where degrees of "public-ness" are relative, not absolute questions.

3.1 Corporeal public property

Public property is most recognizable in its corporeal form, typically alienated[16] land held by the State or Crown, state agencies,[17] or public lands leased to long-term private right-holders.[18] Public land held by government agencies is primarily land dedicated[19] or reserved for public purposes. Its usage depends on its public function: conservation; resource exploitation;[20] education; transport; health; defense; public administration; recreation; and so on. Then there are public lands with no present use; unalienated Crown lands or non-allocated public domain lands that have not been dedicated, reserved, or otherwise dealt with. Interspersed is an inchoate miscellany, the like of permissive occupancies, travelling stock routes, or 'paper' roads, *ad hoc* interests that reflected periodic policy imperatives. To list the broad sweep of corporeal public property in land in any one jurisdiction is to embark on an exercise of miscellany, as table 1 below illustrates.

[16] Part 5 *Crown Lands Act 1989* (NSW).
[17] In the western United States, the dominant landholding agencies are the Bureau of Land Management, the Forest Service, the Fish and Wildlife Service, and the National Parks Service, *One Third of the Nation's Land: A report to the President and to the Congress by the Public Land Law Review Commission*, (1970) 20-21.
[18] State lands leased or licensed to pastoral right holders under various Land Acts in jurisdictions including NSW, Queensland, or New Zealand. In the United States, a loose equivalent is the Taylor Grazing Act permit.
[19] *Randwick Municipal Council v Rutledge* (1959) 33 ALJR 367, 372-3.
[20] For example, the Bureau of Land Management and the US Forest Service administer, 315 million acres of public grazing lands, Karl Hess, *Visions Upon the Land, Man and Nature on the Western Range*, (1992) 11.

Table 1 – Corporeal public property in land in New South Wales

National parks estate

Principal Act: *National Parks and Wildlife Act 1974* (NSW)

National parks, section 30E National Parks and Wildlife Act 1974 (NSW)

Historic sites, section 30F

State conservation areas, section 30G

Regional parks, section 30H

Karst conservation reserves, section 30I

Nature reserves, section 30J

Aboriginal areas, section 30K

Wildlife refuges, section 68

Wild rivers, section 61

Marine parks, *Marine Parks Act 1997* (NSW)

Conservation agreements, Part 4 Division 12

Crown land estate

Principal Act: *Crown Land Act 1989* (NSW)

Crown lands available for lease, special lease, or licence, Part 4, Divs 3, 3A, & 4

Crown lands dedicated for public purposes, Part 5 Division 2

Crown reserves, Part 5 Division 3

State Parks, Part 5 Division 3

Crown reserve trusts, Part 5 Divisions 4 and 5

Enclosure permits, Part 4 Division 6

Crown public roads, (formed and unformed), *Roads Act 1993* (NSW)

Travelling stock reserves, *Rural Lands Protection Act 1998* (NSW)

Submerged lands, coastal harbours and river entrances, Section 172

Commons*, *Commons Management Act 1989* (NSW)

<u>Residual Crown tenures:</u>

Principal Act: *Crown Lands (Continued Tenures) Act 1989* (NSW)

Incomplete purchases

Perpetual leases

Term leases

Special leases

Permissive occupancies

Leases to the Commonwealth

Western lands pastoral estate

Principal Act: *Western Lands Act 1901* (NSW)

Pastoral holdings, Part 6 Division 2

Rural leases, Part 6 Division 2

Urban leases, Part 6 Division 3

Special purpose leases, Part 9E

Forestry estate

Principal Act: *Forestry Act 1916* (NSW)

State Forests, Part 3 Division 2

Timber reserves, Part 3 Division 2

Flora reserves, Part 3 Division 2

* Commons are technically common property, not public property

The physical footprint of corporeal public property is impressive. In the United States, one-third of the continental landmass comprises federally owned public lands.[21] In three of the 11 western states, the percentage exceeds 50 percent.[22] In Australia, Crown land amounts to fifty percent of the landmass of the populous state of New South Wales. In more sparsely settled Western Australia, it is 93 percent. State-owned conservation land alone constitutes one-third of New Zealand's area. Yet despite its superlative acreage, public property lacks the legitimacy or normalcy of private property, a consequence of a binary liberal worldview that naturalizes the primacy of the private rights

[21] *One Third of the Nation's Land: A report to the President and to the Congress by the Public Land Law Review Commission*, (1970).

[22] In Nevada it is 82%, Utah 64%, and California 61%. Scott Lehmann, *Privatizing Public Lands* (1995) 4, 22-23.

holder and views the state with deep suspicion.[23] Hence, its boundaries, physical and metaphorical, are perpetually tested, while collective values are seen as inferior to the individual values of private property. In the western United States, 'sagebrush rebellions'[24] or 'storms over the rangelands'[25] are well-documented episodic revolts against the public property estate. Elsewhere, the unidirectional propensity of private rights to encroach into public space has been observed.[26]

The sheer size of the corporeal public estate seemingly fails to address such existential or normative shortcomings. That it may take incorporeal form unlocks potentialities for new, non-reactive ways to 'see' and understand public property in land.

3.2 Incorporeal public property

Less recognizable is public property's manifestation as an array of incorporeal property rights. As less than fee interests, they comprise a panoply of covenants, easements, servitudes and *sui generis* statutory rights, held by the state, state agencies, the public at large, or private entities that act in the public interest. Incorporeal rights subsist over both private lands, as public rights encumbering private title, and corporeal public land.[27]

Conceptualized as abstract, non-possessory sticks within the bundle metaphor, incorporeal public rights are separate and divisible from the physical land itself. For example, the right of recreational access to private property is a use and enjoyment 'stick' held by the general public. When enacted in England by the *Countryside and Rights of Way Act 2000*, the

[23] Gerard Frug, 'The City as a Legal Concept' (1980) 93 *Harvard Law Review* 1057; Nicholas Blomley, *Law, Space, and the Geographies of Power* (1994).
[24] Robert Nelson, *Public Lands and Private Rights: The Failure of Scientific Management* (1995)
[25] Wayne Hage, *Storms Over Rangelands* (1989)
[26] Ann Brower et al, *The Cowboy, the Southern Man, and the Man from Snowy River: The Symbolic Politics of Property in Australia, the United States and New Zealand* (2009) 21 *Geo. Int'l Envtl. L. Rev* 455.
[27] Part 4A, sections 77A and 77B *Crown Lands Act 1989* (NSW).

statutory right was described in bundle terms as a transfer or re-allocation of 'a valuable property right from private landowners to the public.'[28]

Despite its abstract nature, incorporeal public property plays a (surprisingly) key role in contextualizing property right to place[29] and connecting otherwise fragmented land parcels.[30] Examples include scenic easements that preserve natural vistas,[31] public footpaths that link villages across privately owned farmland,[32] or conservation covenants that form wildlife corridors across private habitat. Re-inserting links between disparate property ownerships militates against Eric Freyfogle's 'tragedy of fragmentation', the private rights-dominated landscape where property holdings are island enclaves[33] 'with no mechanisms to achieve landscape-scale goals'. Freyfogle prescribes as a remedy the reconceptualization of private property and a need to 'reassert the public's varied interests in private lands.' [34]

The conservation easement exemplifies the connectivity potential of incorporeal public property. A statutory interest modeled on the common law easement,[35] the U.S. conservation easement is defined as

> A nonpossessory interest of a holder of real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational or open-space use, protecting natural

[28] Jerry Anderson, *Countryside Access and Environmental Protection: An American View of Britain's Right to Roam*, 9 *Envtl. L. Rev.* 241, 246 (2007).
[29] It is surprising because of the historical tendency of private property since enclosure to decouple property right from context. Nicole Graham, *Lawscape Property Environment Law* (2010) 66.
[30] Eric Freyfogle, *Agrarianism and the Good Society: Land, Culture, Conflict and Hope* (2007) 107-127.
[31] William Hutton, 'Conservation Easements in the Ninth Federal Circuit', in J Gustanski and R Squires eds, *Protecting the Land: Conservation Easements Past, Present and Future*, (2000) 381; Roger Cunningham, 'Scenic Easements in the Highway Beautification Program', (1968) 45 *Denv. L.J.* 167.
[32] Angela Sydenham, 'The Countryside and Rights of Way Act 2000: Balancing public access and environmental protection?', (2002) 4 *Envtl. L. Rev.* 87, 95-96.
[33] Freyfogle, above n30, 35.
[34] Eric Freyfogle, *The Land We Share: Private Property and the Common Good* (2003) 177, 203.
[35] Todd Mayo, 'A Holistic Examination of the Law of Conservation Easements', in J Gustanski and R Squires eds, *Protecting the Land: Conservation Easements Past, Present and Future*, (2000) 27.

> resources, maintaining air or water quality, or preserving the historical, architectural, archeological, or cultural aspects of real property.[36]

Conservation easements first appeared in the 1930s,[37] but their use did not become widespread until 50 years later, when taxation incentives encouraged the donation or sale of perpetual conservation easements to public agencies or land trusts.[38] By the beginning of the 21st century, conservation easements were 'the fastest-growing method for protecting land' in the United States preserving 1.2 million acres from development, at growth rates over the preceding decade of 377%.[39] Many conservation easements vest in or benefit land trusts, 'non-profit organizations that preserve or enhance environmental amenities…on private land.'[40] Landscape resources protected by conservation easements include open space, wetlands, forests, scenic views, recreation and trails, greenways, and coastlines.[41] The legal justification for conservation easements is said to be "significant public benefit."[42] Often the public benefit is indirect, the provision of 'ecosystem services… a nice view… habitat for wildlife, [or] protected farmland.'[43] Direct public 'goods' manifest as walking trails linking national parks, or trails using disused railway corridors. 'Some 78% of land trusts are reported as being involved in maintaining land for public access or recreational purposes.'[44]

In Australia, conservation agreements,[45] or positive covenants protecting environmental, cultural, heritage, or natural resource values,[46] are analogous incorporeal public rights, the benefit vesting in the relevant land conservation

[36] § 1(1) *Uniform Conservation Easement Act*
[37] Cunningham, above n31, 181-183.
[38] The term was first coined in 1959, Richard Brewer, *Conservancy: The Land Trust Movement in the United States* 155, 148 (2003).
[39] Julie Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands* in J Gustanski and R Squires eds, *Protecting the Land: Conservation Easements Past, Present and Future* (2000) 14.
[40] Dominic Parker, 'Land Trusts and the Choice to Conserve Land with Full Ownership or Conservation Easements', (2004) 44 *Nat. Res. J.* 483; Brewer, above n 38, 13-40; Sally Fairfax et al, *Buying Nature*, 178-202.
[41] Gustanski, above n39, 21.
[42] Brewer, above n38, 116; Susan French, 'Perpetual Trusts, Conservation Servitudes, and the Problem of the Future' (2006) 27 *Cardozo Law Rev*. 2523, 2532
[43] Brewer, above n 38.
[44] Gustanski, above n39, 22.
[45] § 69C(1)(a) *National Parks and Wildlife Act 1974* (NSW)
[46] § 77A *Crown Lands Act 1989* (NSW); § 88D & § 88E *Conveyancing Act 1919* (NSW).

agency. [47] Such interests protect private or Crown leased land containing 'scenery, natural environments or natural phenomenon worthy of preservation.'[48] The American land trust is replicated by not for profit organizations such as the Nature Conservation Trust,[49] where voluntary landowner agreements and revolving fund arrangements protect natural and cultural heritage[50] and run with the land through registration.[51] In New Zealand, conservation[52] or open space[53] covenants fulfill similar functions to protect ecological or landscape values.[54]

The English public footpath is yet another example of incorporeal public property. It differs from the wider right to roam in that the footpath right is restricted to established pathways.[55] The public footpath was the transport corridor of agrarian England.[56] 130,000 miles of public footpath remain in England and Wales, as part of original enclosure orders, easements protected through prescription or dedication, or common rights.[57] The public right is resilient, private owners cannot obstruct a footpath's continued access, nor discourage its public use. If an affected landholder seeks to divert the pathway, a 'public path diversion order' may be made, but only where the alternative is not 'substantially less convenient for the public in consequence of the diversion'.[58]

The public trust doctrine,[59] the impression of public obligations on private and public lands, also fits the incorporeal tag. Harrison Dunning describes the

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[47] Land and Property Management Authority for NSW Crown land, National Parks Service for conservation land.
[48] § 69C(1)(a) *National Parks and Wildlife Act 1974* (NSW); § 77A(1) *Crown Lands Act 1989* (NSW).
[49] *Nature Conservation Trust Act 2001* (NSW).
[50] § 30(1) *Nature Conservation Trust Act 2001 (*NSW).
[51] § 37 *Nature Conservation Trust Act 2001* (NSW).
[52] *Conservation Act 1987* (NZ); *Reserves Act 1977* (NZ)
[53] *Queen Elizabeth the Second National Trust Act 1977* (NZ)
[54] Debra Donohue, 'The Law and Practice of Open Space Covenants' (2003) 7 *NZJEL* 119; or Kellie Ewing, 'Conservation Covenants and Community Conservation Groups: Improving the Protection of Private Land' (2009) *NZJEL* 316.
[55] Anderson, above n28, 380-1.
[56] Ibid, 381.
[57] Ibid, 382-3.
[58] § 119(6) *Highways Act 1980* (UK) c. 66.
[59] Joseph Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', (1969-1970) 68 *Michigan Law Rev.* 471.

public trust in incorporeal terms as a 'public property right [that] manifests itself as an interest, like an easement, that burdens ownership of the resource.'[60] Kevin Gray's 'regulatory property' is analogous, private property subject to an overriding public interest that effectively 'vests the property in the citizenry subject only to such privileges … the state positively confers for the time being on the nominal 'owners' of the assets concerned.'[61]

The significance of incorporeal public rights is threefold. First, they broaden our understanding of public property to encompass a diversity of rights beyond fee simple state ownership. Second, they highlight the anachronism of any distinct public/private divide. Conservation easements or public footpaths exemplify that public rights subsist on private lands, and condemn by their existence the notion of a distinct property duality as 'confusion elevated to principle.'[62] Third, they demonstrate public property's potential to invigorate connections across human landscapes; to link property with place and context, and obviate the risks of countless 'tragedies of fragmentation'.

3.3 Customary public property

The sources of public property are not restricted to the mainstream. Property's commodification has masked its ancient alter ego, one with meaning for personhood, identity, and community.[63] Customary public property evidences faint but 'surprising connections' between 'informal usages and understandings' about public property, and their binding effect amongst 'those who practice and share them.'[64]

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[60] Harrison Dunning, 'The Public Trust: A Fundamental Doctrine of American Property Law', (1988-1989 19 *Envtl. L.* 515, 520; Tim Eichenberg et al, 'Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay', (2010) 3 *Golden Gate U. Envtl. L.J*. 243, 247-8.

[61] Kevin Gray, 'Regulatory Property and the Jurisprudence of Quasi-Public Trust' (2010) 32 *Sydney Law Rev.* 237, 245.

[62] Charles Geisler, 'Property Pluralism', in C Geisler and G Daneker eds*, Property and Values Alternatives to Public and Private Ownership*, (2000) 79.

[63] Gregory Alexander & Eduardo Penalver, *Property and Community* (2010); Joseph Sax, 'Do Communities Have Rights? The National Parks as Laboratories of New Ideas', (1984) 45 *University of Pittsburgh LR* 499; Gregory Alexander, *Commodity & Propriety: Competing Visions of Property in American Thought 1776-1970* (1997).

[64] David Bederman, 'The Curious Resurrection of Custom: Beach Access and Judicial Takings', (1996) 96(6) *Columbia Law Review* 1375.

Custom[65] is an awkward, seemingly anachronistic source of modern property law, particularly in settler societies lacking the social history from which customary rules arose. Nonetheless customary norms find ways to percolate into the margins of property discourse. Robert Ellickson's 'order without law' in Shasta County, California, observes the powerful, all-pervasive effect of custom in generating rights, including property rights, amongst tightly knit communities of ranchers.[66] Ellickson concludes that such informal rules arise 'through decentralized social processes, rather than from the law.'[67] Similarly, Gregory Duhl studies food cart owners at Temple University, and surmises that 'the ordering of lunch trucks and carts … illustrates how, in the absence of private property ownership, communities adopt and follow customs and norms to create and order property rights.'[68]

Carol Rose escapes territorial constraints to explore the wider relationship between custom and public property, noting that 'custom provides powerful insights into the nature of "inherently public property"'.[69] Rose posits that the effective management of public property arises 'through the medium of the customs and habits of a civilized citizenry.'[70] Efficient albeit informal governance of public resources by the customary public averts a tragedy of the commons, and instead enhances a sociable 'comedy of the commons', where the greater the use of public property, the greater the resource's social value is maximized, and the 'solidarity and fellow-feeling of the whole community' is reinforced.[71]

> Custom's bright and cheery demeanor has been forcefully espoused… by

[65] There is no universal agreement as to the meaning of the term 'custom'. Andrea Loux, *The Persistence of the Ancient Regime Custom, Utility and the Common Law in the Nineteenth Century* (1993) 79 Cornell LR 183
[66] Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991).
[67] Ibid, 139
[68] Gregory Duhl, 'Property and Custom: Allocating Space in Public Spaces' (2006) 79 *Temple L. Rev.* 199, 200, 207.
[69] Rose, above n6, 722.
[70] Ibid, 774.
[71] 'In a sense, this is the reverse of the "tragedy of the commons": it is a "comedy of the commons" as is so felicitously expressed in the phrase, "the more the merrier."' Rose, above n6, 759.

> many legal writers. And one would have to be a bit of a boor not to feel some favor for a doctrine that allows the rustic villagers to dance around the Maypole on the manor lawn, that permits hardy fishermen to dry their nets on the shore as they have from time immemorial … that gives you and your loved one the right to take a midnight stroll on a windswept beach.[72]

Daniel Nazer's study of surfer norms similarly escapes the strictures of a small community. Rather the global surfing community was a 'large and heterogeneous' one that developed normative patterns of property over public surfing waves, with only minor geographical variations[73]. Such norms require users to 'respect the rules and respect the locals.'[74]

The paradox of custom[75] and property is 'how often custom wins'[76]. Even in the courts, custom as the basis of a public right occasionally prevails.[77] In Oregon, the celebrated case of *State ex rel. Thornton v Hay*[78] established a statewide public easement over private dry sands on the basis of customary practice.[79]

3.4 Illusory public property

This discussion of type concludes with a foray into illusory public property. Carol Rose argues that people 'see' property in a variety of ways, even as false claims, 'the imaginative construction of property… where the law recognizes none.'[80] Much of Rose's discussion centres on people claiming

[72] Bederman, above n64, 1381-2.
[73] Daniel Nazer, 'The Tragicomedy of the Surfers' Commons', (2004) 9 *Deakin Law Rev.* 655, 677.
[74] In 2012, police were called to enforce surfer norms on crowded waves on Australia's Gold Coast, "Police begin surf rage patrols" on http://www.abc.net.au/local/stories/2012/01/19/3411501.htm (12 February 2012).
[75] Duhl, above n68, 238.
[76] Leigh Raymond, 'Viewpoint: Are grazing rights on public lands a form of private property?' (1997) 50(4) *Journal of Range Management* 431; Terry Anderson & Peter Hill, *The Not So Wild, Wild West* (2004).
[77] Navjit Ubhi and Barry Denyer-Green, *Law of Commons and Town and Village Greens* 135 (2004); Steven Eagle, 'Unitary Law of State Takings', (2010) 69-2 *Planning & Environmental Law* 6.
[78] 462 P.2d 671 (1969).
[79] Steven Bender, 'Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon Beaches' (1998) 77 *Oregon Law Rev.* 913, 917.
[80] Rose, above n6, 274

transient entitlements to public spaces as their imagined own, such as lunchtime 'rights' to park benches. Kevin Gray's study of the property norms of spatial order in queues is an analogous example.[81]

Arguably the modern shopping mall best typifies illusory public property, 'private space masquerading as a public space.'[82] As 'open-access private properties'[83] or privately owned 'quasi-public property,'[84] these hybrids foster illusory expectations of public rights of inclusion. The illusion is shattered when private owners enforce behaviour or dress codes, or restrain public assembly or political protest. In such circumstances, 'private proprietorial power [the right to exclude] intrudes into the public sphere.'[85] According to James Kunstler, 'the mall commercialized the public realm.'[86]

3.5 Type and property diversity

The diverse range of public property type is a reminder that public property is capable of being 'seen' in the most likely and unlikely of places. Incorporeal property in particular underscores that there is no bright line,[87] no distinct public/private divide. Rather public property can be found across a continuum, where 'notions of "public" and "private" operate, not dichotomously, but continuously … in which adjacent connotations shade easily into one another,'[88] and 'finely intercalated distinctions or gradations'[89] segue from state-owned public lands to customary public rights. In seeking to understand public property through the spectrum of type, it is the differing degrees of 'public-ness' in land, rather than the formal technicality of individual type, that may prove the most instructive.

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[81] Kevin Gray, 'Property in a Queue', in *Property and Community*, 165-95 (Gregory Alexander & Eduardo Penalver eds., 2010).
[82] James Kuntsler, *The Geography of Nowhere* (1993) 119-120.
[83] Geisler, supra note 61, at 75.
[84] Gray and Gray, above n7, 20-31; K Gray and S Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space' (1999) *European Human Rights Law Review* 46.
[85] Davies, above n11, 11.
[86] Kuntsler, above n82, 119-120.
[87] Davies, above n11, 11.
[88] Gray, above n84, 11.
[89] Ibid, 18

Importantly, a wider 'seeing' of public property in land enlivens a pluralistic mosaic[90] of property rights and uses. Public property contributes to the mosaic by adding different tiles, corporeal and incorporeal to the private monotony. The more we 'see' a variety (and greater quantity) of different property types[91], the less conditioned we become to a self-imposed straitjacket where property and private property are synonymous.[92] Optimistically, property plurality has the potential for human landscapes to become less like a universalized Blackacre,[93] and more representative of where we live.[94]

Legal geographers such as Nicholas Blomley, emphasize that property is best understood by context, 'by reference to its place in and relationship to social, economic, political and ecological systems…"[95] In so doing, they reject an idealized paradigm where the 'law's separateness… [is] deaf to material, physical, spatial and cultural influences.'[96] Edward Relph, a humanist geographer, argues 'an authentic attitude to context or place is important…because from such a relation, authentic places emerge, places which … sustain the earth and those dwelling on it.'[97] Property matters in the pursuit of authenticity, 'both symbolically and literally.'[98] Eric Freyfogle's bleak description of Champaign County, Illinois, where the public owns less than 1% of the county 'setting aside roadways and the remnants of a now-abandoned [and contaminated] air force base'[99] is a depressing and literal vision of property uniformity. To Freyfogle, public lands are the 'remedy for private

[90] Fairfax above n40.
[91] Ann Brower & John Page, 'Property rights across sustainable landscapes: Competing claims, collapsing dichotomies, and the future of property' in David Grinlinton & Prue Taylor (eds.) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (2011) 305.
[92] Macpherson identifies as a modern 'misusage' the identical treatment of property and *private* property. Crawford Macpherson, 'The Meaning of Property', in *Property: Mainstream and Critical Positions* (1999) 2.
[93] Freyfogle, above n34, 110.
[94] Rob Garbutt, *The Locals* (2011) 29-30.
[95] Jane Holder & Carolyn Harrison, 'Connecting Law and Geography' in Jane Holder & Carolyn Harrison (eds.), *Law and Geography* (2003) 3.
[96] Ibid.
[97] Relph, quoted in Garbutt, above n94, 54-55.
[98] Harvey Jacobs, *Is an Answer Blowin' in the Wind?* (2010) 62-9 *Planning & Environmental Law* 8.
[99] Eric Freyfogle, 'Private Rights in Nature: Two Paradigms' in P. Burdon (ed.) *Wild Law The Philosophy of Earth Jurisprudence* (2011) 271

irresponsibility'.[100] James Kunstler's *The Geography of Nowhere* is an equally grim visage of the decline of the American public realm, the 'landscape tissue that ties together the thousands of pieces of private property that make up a town, a suburb, a state.'[101]

While largely a descriptive exercise, the spectrum of type subverts the inevitability of Kunstler's thesis or the unremitting bleakness of Freyfogle's imagery. Its opportunities lie in expanding the definitional parameters of what is public property. Its significance lies in its consequence, a weakening of private ubiquity, and the optimistic consequences this may pose for re-physicalizing property rights to place. It demonstrates that we are not prospectively fated by the constraints of Eduardo Penalver's land memory, 'the consequences of countless decisions made decades (even generations) ago'[102] about singular property patterns, that there are alternatives to Champaign County-like uniformity. Seeing a wide diversity of public type may alter such restrictive 'path dependencies' for the better.

4. The conundrum of ownership

Ownership is premised on the vesting of property rights in a recognizable entity in their capacity as owner,[103] a 'right to have and to dispose of possession and enjoyment of the subject matter.'[104] In the case of public property, the ownership entity assumedly has a public status, the state, or an agency of the state.[105] But this assumption poses further questions; does the state or state agency own the land absolutely, or pursuant to some trust for and on behalf of its citizens? And what of private organizations such as land trusts that hold stick rights in property that benefit the public? These questions suggest that like the public/private divide, the issue of ownership is likewise not a 'bright line.'[106]

[100] Freyfogle, above n34, 96.
[101] Kunstler above n 82.
[102] Eduardo Penalver, 'Land Virtues' (2009) 94 *Cornell L.R.* 822, 830-1
[103] Jeremy Waldron, *The Right to Private Property* (1988) 47.
[104] *Yanner v Eaton* (1999) 201 CLR 351.
[105] Rose, above n6, 719.
[106] Davies, above n11.

Putative ownership by the public at large is a further muddying of the ownership waters. Carol Rose argues that rights in 'inherently public property' are controlled neither by government agencies nor private entitles, but by society at large.[107] Rose calls this owner the 'unorganized public'.[108] In the United States, ownership of inherently public property by the unorganized public is given effect by the doctrine of public trust. Originally concerned with core areas such as navigable waterways, the public trust has proven a 'resurgent concept',[109] bringing within its ambit new forms of contestable 'inherently public property'[110] that recognize community or public values in diffuse resources.[111] This in turn expands the types of property capable of ownership by an amorphous unorganized public.

Joseph Sax frames ownership from a values perspective, in the process identifying a fault line common to the cultural divide between property as a private commodity, and property's social or communitarian meanings.[112] Sax states that '[t]he debate over ownership of the public lands is basically part of a much larger controversy over the legitimacy of collective versus individualistic values.'[113] Courts tend to prefer individualistic values: '[t]he common law tradition is not entirely friendly to group rights.'[114] In Australia, the High Court held that members of the public generally do not acquire any proprietary estate or interest in public land.[115] But its judgment was framed from the perspective of the private paradigm, where 'right …does not in its

[107] Rose, above n6, 720.
[108] Ibid., 722.
[109] Joseph Sax, 'Some Thoughts on the Decline of Private Property', (1982-1983) 58 *Wash. L. Rev.* 481, 482
[110] Mark Squillace, 'Common Law Protection for our National Parks' in David J. Simon (ed.) *Our Common Lands Defending the National Parks* (1988) 96-97; Alison Rieser, 'Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory', (1991) 15 *Harv. Envtl. L. Rev.* 393; Jack Archer et al, *The Public Trust Doctrine and the Management of America's Coasts* (1994) 22-30; Charles Wilkinson, 'The Public Trust Doctrine in Public Land Law', (1980-1981)14 *U.C. Davis Law. Rev* 269.
[111] Carol Rose, 'Joseph Sax and the Idea of the Public Trust', (1998-1999) 25 *Ecology L. Q.* 351, 355
[112] Alexander, above n63.
[113] Joseph Sax, 'The Claim for Retention of the Public Lands', in *Rethinking the Federal Lands* (S. Brubaker ed., 1984) 130.
[114] Carol Rose, 'Property and Language, or the Ghost of the Fifth Panel' (2006) 18 *Yale Journal of Law and the Humanities* 1, 13.
[115] *Stow v Mineral Holdings (Australia) Pty Ltd* (1977) 51 ALJR 672

context mean a public right; it means an individual right of a proprietary nature', and 'interest' mean 'interests held by persons in their individual capacity.'[116] Yet the court did touch on what public ownership may entail

> It [the statute] does not embrace interests in which the individual concerned has no greater claim than any other member of the public. All members of the public have a right to pass freely along and across public highways but none have in their capacity as members of the public any estate or interest in such land. Likewise members of the public may be entitled pursuant to particular statutes to use specified areas of Crown lands for the purpose of recreation… All members of the public may have the right to go upon such land [to] freely walk thereon…and may resist attempts by the Crown or anyone else to eject them from such land.

Ownership of public property must be seen in context, informed by property's collective values, where rights are measured in terms of their collective sum rather than individual entitlement. In this Part 4, three specific questions will be canvassed: must public property be owned by a discrete ownership entity; is public ownership an absolute concept; and is the better question one of state agency *management or control* rather than ownership?

4.1 Entity or no entity?

Unlike private property,[117] the involvement of a distinct ownership entity may not be a theoretical necessity for public property. Rose's 'unorganized public' exemplifies that inherently public property may be owned by the collective public at large.[118] The *prima facie* answer to this question suggests there is no limitation on who owns public property. The state, a state agency, the public at large, even (in the case of conservation easements) private owners, may 'own' public interests in land.

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[116] Ibid, 679.
[117] Jeremy Waldron, 'What is Private Property?' (1985) 5 *Ox. J. Legal Stud.* 313, 327.
[118] 'The customs of a civilized citizenry ensure good governance of such resources,' Rose, above n6.

Direct ownership by the state or a state agency is a paradigm framed within (private) property's individualistic values and rhetoric of exclusion.[119] It also has perverse consequences. Richard Barnes observes that ownership of collective property by the 'individual' state is in effect a variation of private ownership that precludes it generating 'a specific normative meaning.' [120] Margaret Davies agrees in part. In articulating a 'taxonomy of owners', Davies lists five possible classes of owner: private individuals, companies, governments, a limited community, or the public at large. Davies argues that individual and corporate ownerships are 'private', while 'government ownership of resources such as office buildings [is also] essentially private.'[121] On the other hand, ownership by limited communities or the public at large are 'dispersed.' But government ownership of 'public infrastructure, and environmental resources such as parks and beaches on trust for the public'[122] are neither private nor public, an unsatisfactory lacuna. Crawford Macpherson describes 'state property' as 'corporate private property', where a 'smaller body of persons authorized to command its citizens' exercise a corporate right to exclude.[123] It is as if explicit ownership by a state or state agency taints public property's *public-ness*, and relegates the ownership of key public places (such as Davies' parks and beaches) to an uncertain no-man's land.

By contrast, 'public domain goods' are in Davies' terms 'fundamental to a flourishing community; they provide us with the basic ability to move about, to undertake trade and commerce, to engage in recreation, to situate ourselves historically, culturally, or even spiritually, to communicate and express ourselves.'[124] As Rose argues, they vest in an unorganized public. Macpherson also writes of an 'unorganized public', a mass of individuals with individual rights in 'analogous common property.'[125] He argues that rights in

[119] Merrill, above n7; S. Balganesh, 'Demystifying the Right to Exclude' (2008) 31 *Harvard Journal of Law & Public Policy* 593
[120] Richard Barnes, *Property Rights and Natural Resources* (2009) 154.
[121] Davies, above n11, 63-4.
[122] Ibid, 64
[123] Macpherson, above n92, 5-6; Gray & Gray, above n7, 13.
[124] Davies, above n11, 65-6
[125] Macpherson uses the examples of 'public parks, city streets, highways', as property for 'common use', Macpherson, above n92, 4.

such property are 'the most unadulterated kind of property', a right of each natural person not to be excluded from the property's use and benefit.'[126]

Ownership by the public at large, whether Rose's amorphous mass, or MacPherson's mass of individuals, may be preferable since it avoids unfavourable analogy with private ownership and sidesteps the implications of exclusion. And by invoking property's collective values, it may prove the sanguine catalyst for greater normative meaning for public property in land.

4.2 In trust for the public?

References to public property in land frequently invoke the concept of trust. To borrow its terminology, the trust may be express (in the case of charitable trusts), or implied or resulting (where 'trust' is used in a non-technical sense). Private land trusts also conform to this paradigm, signifying that the public stick they hold over private land is impressed by obligations in favour of local communities, the wider public, or the public interest.[127]

Fairfax and Souder use the educational state land trust as a platform for arguing, 'trust principles ought to occupy a more prominent place in our understanding of publicly owned land than they do.'[128] Rather than some scholar's wishful thinking of 'wouldn't it be lovely', Fairfax and Souder argue that the state land trust as 'arguably the oldest of all federal programs and … the most durable national approach to public resource ownership',[129] already provides an enduring template. Raising its profile presents an opportunity for a 'new but not untested route to thinking about public ownership.'[130]

By contrast, the public trust doctrine enjoys a high profile, and is the subject of a rich literature. Its contemporary resurrection since the 1970s is attributed to

[126] Ibid, 6; Barnes, above n123, 154
[127] Conservation trusts are 'clearly invested with the public interest.' Sally Fairfax and Darla Guenzler, *Conservation Trusts* (2001) 5.
[128] Souder & Fairfax, above n3, 87, 89.
[129] Ibid, 90.
[130] Ibid.

Joseph Sax,[131] although its history can be traced to the jus publicum of Roman law, and the English common law before its reception in the United States.[132] It origins lie in the nature of property in rivers, lakes, and foreshores adjoining water bodies as inherently public property, or 'at least subject to a kind of inherent easement for certain public purposes.'[133] While private ownership of foreshores was possible, the incorporeal public property inherent to those lands (such as rights to navigable waters) was itself inalienable.[134]

Its common law credentials were affirmed in the 'lodestar'[135] case of *Illinois Central Railroad Company v Illinois*,[136] where the US Supreme Court upheld the State's repeal of a land grant comprising foreshores and submerged lands of the Chicago waterfront. The court held that these lands were public trust resources, such that the initial grant by the state to the railroad company was void.[137] The doctrine was neglected until growing environmental awareness in the late 1960s re-awakened its potential, 'liberating it from its historical shackles,'[138] to protect public rights in a diverse range of public resources.[139] These include access rights over the dry sands of beaches, limits on the appropriation of water to serve public trust values,[140] and even 'property' in surfing waves.[141] This expansion has relied on a lateral interpretation of its founding shackles, a creative linking of new public resources with the common denominators of navigable waters or foreshores below the high water mark.[142] These newer forms of public trust property have been described as possessing a 'natural suitability for common use' and tendency

[131] Sax, above n59.
[132] Ibid, 475-478; Megan Higgins, 'Public access to the shore: public rights and private property,' in D Whitelaw and G Visgilio (eds.) *America's Changing Coasts: Private Rights and Public Trust* (2005) 183-4.
[133]Rose, above n6, 351.
[134] Dunning, above n 60, 516.
[135] Sax, above n59, 489-491
[136] 146 U.S. 387 (1892)
[137] Dunning, above n 60, 521; Archer above n110, 11.
[138] Joseph Sax, 'Liberating the Public Trust Doctrine from its Historical Shackles' (1980) 14 *U.C. Davis L. Rev.* 185.
[139]Clifford Rechtschaffen & Denise Antolini, *Creative Common Law Strategies for Protecting the Environment* (2007).
[140] *National Audubon Society v Superior Court ('Mono Lake')* 33 Cal. 3d 419, 658 P.2d 3
[141] Nazer, above n73, 678.
[142] For example, in *Mono Lake*, the link was the potential navigability of waters in the lake. The substance was however concerned with preserving environmental flows from the lake.

towards 'scarcity',[143] or qualities essential for communication, travel and sociability.[144] Despite its critics,[145] the public trust is 'a recognition of important public property rights'[146] premised on the fragmentation of ownership between bare legal title and beneficial property subject to public trust. In the case of private lands, the grantee holds a naked fee subject to public trust rights.[147] In the case of public lands, there is no merger that extinguishes the public trust.

Trust relationships in public property also arise through the gift or transfer of private land to public authorities for specified purposes,[148] as conditions of planning consent,[149] or by operation of statute. For example, in New South Wales, the Crown reserve trust is a statutory creature under the Crown Lands Act.[150] The New Zealand Reserves Act establishes a similar regime. That Act applies to Crown land classified under section 16 according to its primary or principal purpose. Purposes include recreation,[151] historic,[152] or scenic[153] reserves. Title to reserves is vested under sections 26 and 26A, such that 'all land so vested shall be held in trust for the purpose or purposes for which the reserve is classified.' In a New Zealand High Court judgment dealing with conflicting private uses on Crown land,[154] section 26A was scrutinized, the court concluding that 'the general public of New Zealand must be regarded as the beneficiaries. The concept is one of public ownership.' [155] The Reserves

[143] Dunning, above n60, 523.
[144] Rose, above n6.
[145] Steven Jawetz, 'The Public Trust Totem in Public Land Law: Ineffective- And Undesirable-Judicial Intervention', (1982) 10 *Ecology L.Q.* 455.
[146] Dunning, above n60, 516.
[147] Jan Stevens, 'The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right', (1980) 14 *U C Davis L. Rev.* 195, 215-6.
[148] In *Brisbane City Council v Attorney-General (Qld)* [1978] 3 CLR 299, land transferred on the condition that it be preserved as a showground gave rise to a charitable trust that precluded its owner, the Brisbane City Council, from selling the land.
[149] Adrian Bradbrook et al, *Australian Real Property Law* (5th ed., 2011) 357.
[150] Crown reserve trusts are "[a] legal body which cares for a Crown reserve on behalf of the people of NSW.' http://www.lpma.nsw.gov.au/trusts/trusts2 (May 29, 2011). See also Divisions 4 and 5, Part 5, Crown Lands Act 1989 (NSW).
[151] § 17 *Reserves Act 1977* (NZ).
[152] § 18 *Reserves Act 1977* (NZ).
[153] § 19 *Reserves Act 1977* (NZ).
[154] *Gibbs v The New Plymouth District Council* [2006] NZHC 231
[155] *Gibbs v The New Plymouth District Council* [2006] NZHC 231, [16]-[17]

Act 'confer[s] legal ownership … in the Crown while making it clear that the land is held on trust for all New Zealanders.'[156]

Nor is the language of trust necessarily restrained by a lack of an equitable or statutory basis for the beneficial relationship claimed. Narratives surrounding the public property estate, particularly iconic public property, often describe such lands as being held 'in trust for', or 'on behalf of' its citizens. This proprietorial claim is substantiated by broad-brush references to the nature of democratic governance, or the people's common legacy in important natural resources. On the 50th anniversary of the U.S National Park Act in 1966, National Geographic magazine quoted its first director Stephen Mather claiming that the park system belonged 'to everyone-now and always.'[157] The landmark Report of the Public Land Law Review Commission in 1970, repeated this common legacy view, '[t]hese lands are a natural heritage and national asset that belong to us all.'[158]

An implied trust seemingly results from state ownership, accentuated where the lands are iconic, or under threat of loss.[159] While the nominal owner may be the state, its title is a threadbare one. The true beneficial owner, illusory or otherwise, is the people. Margaret Davies' description of 'parks and beaches being held in trust for the public'[160] is a previously traversed exemplar of this narrative. Carol Rose speaks similarly of 'the public… as a kind of beneficial owner of diffuse resource rights…',[161] while legal historian Harry Schneiber talks of legislatures acting as trustee 'for the best interests of the public'[162] with regard to certain types of public property.

The concept of trust permeates public property, its doctrines, statutes, and rhetoric. Its redolence suggests an inclination for public property to vest in the

[156] *Gibbs v The New Plymouth District Council* [2006] NZHC 231, [14]
[157] *National Geographic,* July 1966, Vol. 130(1), 2.
[158] *One Third of the Nation's Land: A report to the President and to the Congress by the Public Land Law Review Commission,* 20 (1970).
[159] Matt Philp, 'The No-Go Zones', *North & South*, August, 2008, 44.
[160] Davies, above n11, 64.
[161] Carol Rose, 'A Dozen Propositions', (1996) 53 *Wash. & Lee L. Rev.* 265, 276.
[162] Harry Scheiber, 'Public Rights and the Rule of Law in American Legal History', (1984) 72 *Cal. L. Rev* 217, 223.

collective sum of us. But where does that leave the individualistic state or state agency?

4.3 Ownership or management rights?

Eric Freyfogle believes that the 'biggest difference between public and private lands has to do with management power over the land.'[163] Yet again there is no bright line.

> Decisions about public lands are mostly made by public decision-makers, but not completely so. Public decision-makers are often influenced by private parties who want to use the lands. Indeed, private involvement in public-lands processes is extensive, too extensive, some people say.[164]

Freyfogle's emphasis on state management rather than ownership may be apt. Where the state is a bare trustee, its role is reduced to management of trust assets for the exclusive benefit of the true beneficial owners, who retain the bulk of the key bundle rights. The state's residual right is essentially a right to manage, and this right is constrained by trust obligations. Shorn of most of the hallmark property rights, it may be unrealistic to describe the state's dearth of bundle rights in public property as proprietorial.[165]

Indeed from the state's perspective, is ownership *per se* the prime objective for its public property estate? As Sally Fairfax and her colleagues observe

> Ownership does not ensure control. The relevant myth here suggests that if you own land, you can protect it. The reality… is that formal ownership frequently provides little control or resource protection at all. This is particularly true on federally owned land, despite federal ownership being

[163] Freyfogle, above n34, 93.
[164] Ibid
[165] 'In some cases… property rights may contain so few traditional sticks in the bundle as to defy continued description by the term *property*.' Leigh Raymond, *Private Rights in Public Resources* (2003) 18.

> commonly portrayed as the preferred tenure arrangement for conservation….[166]

The state as bare owner may be better employed devoting its energies to the effective control of the public land it manages on behalf of its citizens. Good state management may reinforce the integrity of public property, and silence its critics.[167]

Ownership of public property is a vexed issue. Its inexactitude suggests that it is not the defining characteristic of public property that it should be. Who owns public property, and in what capacity, are complex questions lacking ready answers. Part of the struggle to respond may be attributed to a values paradigm of dominant individualism. Its end result leaves us less equipped to meaningfully understand the ownership of public property in land.

4.4 Ownership and diffusion

One clearer way to explain the conundrum of ownership is the idea of diffusion, Rose's 'the more the merrier.'[168] Simply, the more dispersed our sense of 'ownership', the more interested we become in its management and welfare. Diffusion rests on an instinctive imperative that citizens should conceive of public property as 'their own', no matter how 'thin' the ownership.

The disaggregation of property ownership amongst the public at large, decentralizes property 'rights' and spreads relative degrees of ownership amongst a wide class of persons.[169] Joseph Singer describes this dispersal

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[166] Fairfax, above n40, 257. A topical example is the Victorian Government's ownership of its high country national parks. Its title did not prevent the Australian Federal Government enforcing a ban on private cattle grazing in alpine national parks, Patricia Karvelas, 'Commonwealth overrides Victoria on issue of grazing in alpine park', *The Australian*, March 18, 2011.

[167] Again in the Victorian high country a criticism of national parks is their failure to manage fire risk. This in turn corroborates the argument for private cattle grazing rights in national parks to 'eat down' the fuel. Such perceptions in local communities diminish the wider integrity of public land holding; Brower, above n26.

[168] Rose, above n6, 7.

[169] John Page, 'Towards a Sustainable Paradigm for Property', (2011) 1 *Property Law Journal* 86.

as inherent in his 'nuisance' or citizen' model of property. 'The effect is to identify multiple persons who have legally protected interests in the same piece of property and therefore have something to say about how it is used.'[170] Singer further refines this view into a relational one where links to place became more explicit, the 'environmental' or 'good neighbor' model,[171] where dispersed property rights are 'overlapping or imbricated',[172] such that individual or collective acts have wider flow on effects to neighbors and the environment. Diffusion facilitates self-adjusting 'checks and balances' though the spreading of ownership across landscapes. 'These trans-boundary overlaps … constrain an owner's ability to act unilaterally, while at the same time diffuse ownership to a wide range of owners with different vested interests in their ownerships.' [173]

The exponential expansion of a class of (self) interested public owners has two effects, first it spreads the individual public's sense of ownership, second, intricate levels of overlap mean that everyone has a vested interest in the consequences of another's (adverse) acts over public property. One's sense of property in a public place thus elevates itself from ambiguity to a diffused sense of propriety, a concern for its welfare, and a willingness to get involved to protect it. That the law will act to protect public property rights[174], sometimes at the behest of the state, but often at the instigation of informal community or representative groups, is a tangible outcome of the diffusion of ownership of public property in land.

Diffusion is deeply conceptual and problematic in practice. How can scattered public 'ownership' rights be regulated and enforced? What can prevent a motivated, self-interested few capturing the public estate to the detriment of an apathetic many? The American experience of the public trust suggests a

[170] Joseph Singer, *Entitlement: The Paradoxes of Property* (2000) 88.
[171] Joseph Singer, 'Property Norms Construct the Externalities of Ownership' in Gregory Alexander & Eduardo Penalver (eds.) *Property and Community* (2010) 57, 60; Joseph Singer, 'The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations', (2006) 30 *Harv. Envtl. L. Rev*. 309
[172] Ibid, 57, 60.
[173] Ann Brower & John Page, 'Does (Property) Diversity beget (Landscape) Sustainability?' in *Environmental Governance and Sustainability*, Paul Martin et al (eds.), (2012).
[174] 'Legal institutions protect property rights, both public and private', Rose, above n6.

role for the judiciary as guardians of the public interest in public property. This chapter does not purport to provide ready answers to such prosaic matters. Yet, fundamentally, developing a sense of public propriety requires paradigmatic change. Articulating what a right of inclusion may encompass is one step in beginning such an incremental shift.

5. The right to include

If exclusion is the hallmark right of modern private property,[175] logically inclusion should be public property's inverse gatekeeper.[176] As a guiding principle, what is meant by a right to include? Does its foil define it, such that it is a right *not* to exclude?[177] Or does it have an independent, positive meaning, a right to *access* 'material resources'? [178]

Carol Rose warns that

> It is a serious mistake to think of property only in metaphors of exclusion, boundaries, and disengagement. These are metaphors drawn chiefly from land, but human[s] have devised ways to allocate property in many other things … We have created not only individual property, but also partnership property, common property and public property. Human interactions make property into a thoroughly malleable institution, and one that adjusts to a vast variety of subjects.[179]

Rose's advice intimates that exclusion is a flawed place to start. Nor is Rose alone in observing that property is a 'thoroughly malleable institution' that moulds to context.[180] To define inclusion by what it is not is counter-contextual

[175] Merrill, above n7.
[176] Hamilton & Bankes, above n2, 19, 26.
[177] Jonathan Mitchell, 'What Public Presence? Access, Commons and Property Rights (2008) 17 *Social & Legal Studies* 351, 353.
[178] Waldron, above n117, 31.
[179] Carol Rose, 'Rhetoric and Romance: A Comment on Spouses and Strangers', (1992-1993) 82 *Georgetown Law Journal* 2409, 2420
[180] Singer, above n 170; Joseph Sax, 'Property Rights and the Economy of Nature', (1992) 45 *Stanford Law Review* 1433, 1446.

and affirms that exclusion is the *sine qua non* of property.[181] Inclusion deserves a stand-alone definition.

Language is one starting point. Roget's Thesaurus lists numerous synonyms for *inclusion*: participation; membership; affiliation; eligibility; admission – terms that embody shared or common possession of space.[182] The links between language and property are intimate and powerful; Carol Rose calls them 'a central project of her legal scholarship.'[183] Language is not only words in a thesaurus, but in a broader sense a means of persuasive communication; in the case of property, its symbols, visual cues, or collective narratives.[184] Rose proffers a number of images as the 'expressive endeavor' or 'symbolic presentation'[185] of public property, streetscapes, parks, highways, and most evocatively, a fresco of a sociable street scene in medieval Siena, a 'good life' where 'people stop to chat with one another and with the street vendors, … laugh at a pet monkey's antics, drop into a shop and buy something, or have a seat and watch the other passers-by.'[186] The democratic sharing of a public space is an uncomplicated way to see public property, an image that captures the diverse language of inclusion. It is the antithesis of private property's 'expressive endeavor': the fence, gate, keep-out sign, and private world inside.

5.1 Inclusion and access

Access ought to be the epitome of inclusion. It lies at the heart of Rose's street scene. Yet the right of access is far from clear-cut. Some public lands are openly accessible; others have conditions attached to their intrusion (such as the payment of entrance fees in popular national parks), while in other cases, there is no access at all (military land, or dedicated wilderness, or

[181] Merrill, above n7.
[182] *Roget's Thesaurus of English Words and Phrases* (1962) 755.
[183] Carol Rose, 'Property and Language, or, the Ghost of the Fifth Panel', (2006) *Yale Journal of Law and the Humanities* 1, 2.
[184] Carol Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory', (1990) 2 *Yale Journal of Law & the Humanities* 37.
[185] Rose, above n6.
[186] Ibid, 18.

wildlife preservation areas[187]). In the United States there is also a constitutional overlay affecting public property historically open to the public, so-called 'public forums.' '[I]n such places [parks, sidewalks, town squares] the government's ability to permissively restrict expressive conduct is very limited.'[188] Conversely '[p]ublicly owned or operated property does not become a 'public forum' simply because members of the public are permitted to come and go at will.'[189] In Australia or New Zealand, no such constitutional implications impact on public access. In other cases, legislation may give an occupier of prescribed public lands the discretion to eject intruders provided a prior demand to leave is made, deeming the recalcitrant intruder a trespasser.[190] Such legislation places the emphasis on the right to exclude, at times confusing Barnes' 'needs of society as a whole' with the 'self-serving interest' of the particular occupier, public or private.[191] In sum, access as a proposition is a mélange of unqualified, qualified, or denied entitlement.[192]

Even where access appears unfettered, externalities may practically restrict freedom of entry. A surrounding landholder may effectively capture the public lands by impeding the most feasible points of access. A consequence of effective capture is their *de facto* privatization. Private capture of public lands in New Zealand's iconic high country is the subject of separate academic scrutiny.[193] Equally, contested access through private land to beach and coastal foreshore attracts vocal, high profile attention.[194] In June 2010, *Stop the Beach Renourishment v Florida Department of Environmental*

[187] There is no public access to Codfish Island in New Zealand, home to the Department of Conservation breeding program for the endangered flightless kakapo parrot.
[188] *United States v Grace*, 461 U.S. 171, 177 (1983).
[189] Ibid.
[190] *Inclosed Lands Protection Land 1901* (NSW); *Trespass Act 1980* (NZ)

[191] In New Zealand, the *Trespass Act 1980* (NZ) is described by its opponents as draconian, Proceedings of the Federated Mountain Clubs Backcountry Recreation 2000 Conference, *Ruling and Regulating or Freedom of the Hills*, St. Arnaud, Nelson Lakes, September 27-29, 1991.
[192] Jeremy Waldron, 'Homelessness and The Issue of Freedom' (1992) 39 *UCLA Law Rev.* 295, 297-8.
[193] Brower, above n8; John Page and Ann Brower, 'Property Law in the South Island High Country – Statutory Not Common Law Leases' (2007) 15 *Waikato Law Rev.* 48
[194] Dion Dyer, California Beach Access: The Mexican Law and the Public Trust, (1972) 2 *Ecology L.Q.* 571, 573.

Protection[195] was 'the [US Supreme Court's] case of the year for planners and land use practitioners',[196] a curious dispute about property rights, accretion and littoral access.[197] Beaches are much-loved public places.[198] Access to them engages the *many* as well as the *few*[199] in both its practice and idea. Yet despite their revered status, a brief comparison of 'beach law' in the United States and New Zealand illustrates that access is far from being a uniform touchstone of the public estate and its inclusiveness.

Access to the wet sands of American beaches through privately owned dry sands is a 'perplexing'[200] issue. Public rights are piecemeal,[201] limited by the low tide in some states, extending to the mean high tide mark in others, and in Texas protected by public rolling easements to the first vegetation line.[202] Inconsistent applications of doctrines such as prescription or implied dedication yield unpredictable outcomes. In a handful of states, there has been a 'Lazarus-like'[203] resurrection of beach access rights, which David Bederman ascribes to four customary models; 'failed attempts to extend 19th century common law doctrine in the New England, statutory codification of custom in Texas,[204] judicial instrumentalism in Oregon, and protection of uniquely indigenous rights in Hawaii.'[205] Outside Bederman's 'four corners', the extension of the public trust to the dry sands has been most expansively achieved in New Jersey.[206] Elsewhere, the public trust has produced

[195] 130 S.Ct. 2592, June 17, 2010. It was held that building sand buffers to protect coastal communities was a 'public property right…that had no effect whatsoever on any property rights held by coastal property owners under Florida law.' John Echeverria, 'Green Light for Beach Renourishment, Red Light for Judicial Takings', (2010) 62-9 *Planning & Environmental Law* 4.
[196] Lora Lucero, 'Stop the Beach Renourishment – Six Perspectives', *Planning & Environmental Law* (2010) 62-9, 3.
[197] It is 'curious' because the petitioners were private landowners protesting about state efforts at sand buffering.
[198] Bederman, above n64.
[199] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1968).
[200] Stevens, *supra* note 145, at 230.
[201] Bender, above n79, 914.
[202] Eichenberg et al, above n60; Margaret Peloso & Margaret Caldwell, 'Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate' (2011) 30 *Stan. Envtl. L.J.* 51, 57-8.
[203] Bederman, above n64, 1379.
[204] Duhl, above n68, 215-6.
[205] Ibid, 1408.
[206] Archer, above n110, 107-108.

outcomes that are underwhelming.[207] In California, a famous beach culture has not equated to universal access rights over upland dry sands. While Californian courts have been active in expanding other categories of public trust property,[208] sea-locked tidelands remain contested.[209] The Supreme Court's oft-cited decision in *Nollan v California Coastal Commission*[210] held that a consent condition requiring owners of a beachside home to grant a public easement over their private beach, was a compensable taking of property. Nollan affirms that beachfront easement access is 'purchased by the landowner… [it was never] a separate, state-owned legal interest.'[211] Rather eminent domain, resumption with compensation, is the most appropriate means of securing public beach access.[212] In contrast, uniform beach access rights in Oregon were achieved on the basis of a statewide custom in *State ex rel. Thornton v Hay* ('*Hay*').[213] Despite its critics,[214] *Hay* delivered to 'Oregonians…the unique privilege of beach access and recreation… on Oregon's 362-mile coastline.'[215] Steven Bender evaluates the bundle held by the Oregon littoral landholder post-*Hay*, and concludes that only the right to exclude is missing. *Hay* is an interesting exemplar of property plurality; Bender observing that side by side with the public right of access is the private right to prevent unreasonable public use. Accessing wet sands of American beaches is fraught with inconsistency. Entitlements vary widely, with rationales ranging from state custom (implemented by statute or common law) to divergent interpretations of the public trust.

In New Zealand, public confidence in access to the beach and coastal foreshore, once a given, has eroded since 2003.[216] A 'perfect storm'[217] of

[207] Ibid, 82, 106; Higgins, above n132, 183-4.
[208] Archer above n110, 23
[209] Dyer, above n194, 578.
[210] 483 U.S. 825 (1987)
[211] Michael Heller, 'The Boundaries of Private Property', (1998) 108 *Yale L.J.* 1163, 120; Archer, above n110, 83, 105.
[212] Brower & Page, above n173.
[213] 462 .2d 671 (1969)
[214] Duhl, above n68, 216-217; Bederman, above n64, 1381.
[215] Bender, above n79, 913.
[216] David Grinlinton, 'Private Property Rights versus Public Access: The Foreshore and Seabed Debate', (2003) 7 *NZ Journal of Envtal. Law* 313.
[217] Ibid, 314.

indigenous Maori customary claim to the foreshore (the *Ngati Apa* case),[218] a government report identifying the incomplete nature of the Queen's Chain,[219] and the ongoing decline of traditional conventions about access to the outdoors[220], contributes to heightened disquiet about public "no-go zones".[221] The *Foreshore and Seabed Act 2004* (NZ)[222] and its extinguishment of Maori customary title, failed to assuage underlying anxiety, seemingly confirming the view that the feared specter of plurality of foreshore ownership was 'something of a red herring… a comparatively minor aspect of a much bigger issue.'[223] Its repeal and replacement by the *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ),[224] ushers in an untested regime for access to foreshores. Section 11 divests Crown ownership of the foreshore and seabed, and substitutes it with a new concept of a 'common marine and coastal area',[225] land owned by no one.[226] Critics describe this nomenclature as 'spin doctoring', one that does not change radical title in the New Zealand Crown.[227] Public access to the 'common marine and coastal areas' is preserved under section 26(1),[228] yet others charge that this is flawed; access is precluded where there are sacred Maori lands,[229] and the Act is silent on customary owners imposing fees for access.[230] A vocal campaign to restore Crown ownership of the foreshore and seabed is reactively driven by the fear

[218] *Attorney-General v Ngati Apa* [2003] 3 NZLR 461
[219] The Land Access Ministerial reference Group, *Walking Access in the New Zealand Outdoors* (August 2003) ('the Acland Report').
[220] Proceedings of the FMC Backcountry Recreation 2000 Conference, *Ruling and Regulating or Freedom of the Hills*, St. Arnaud, Nelson Lakes, September 27-29, 1991; Grinlinton, above n216, 319.
[221] The front cover of NORTH & SOUTH magazine in August 2008 pictures a beach and a strand of barbed wire, ' Your access to public places is under threat.' *North & South*, August 2008.
[222] Since repealed.
[223] Richard Boast, *Foreshore and Seabed* (2005) 6.
[224] The new Act responds to Maori grievance over the loss of customary rights in the seabed and foreshore.
[225] Earlier drafts of the Bill had called the 'common marine and coastal area' the 'public domain.'
[226] § 11(2) *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ)
[227] Grinlinton, above n216, 326.
[228] § 26(1) *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ)
[229]§ 26(2) *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ)
[230] David Round, *Foreshore and seabed public access* at http://www.nzcpr.com/guest217.htm (May 29, 2011)

of losing a New Zealand 'birthright and common heritage'[231], the right of free access to the beach.

The divergent U.S. and New Zealand experiences are indicative of a wider malaise. The right of public access is an underdeveloped, incomplete discourse in the common law,[232] no more so in the case of the much-loved beach. Its immaturity means that access is far from a default benchmark of public property rights. In speaking of coastal access in New Zealand, Richard Boast opines that the right is in need of 'serious consideration of what such a right may involve … how it should influence law and policy.' "[P]rincipled public discussion… has been sadly absent." [233]

The *Countryside and Right of Way Act 2000* (UK) ('CRoW'), and its extension to coastal areas by the *Marine and Coastal Access Act 2009*[234] is a proactive intervention into the vagaries of public access. CRoW is idiosyncratically English, a long delayed,[235] ideologically couched[236] response to the loss of ancient access rights. Jerry Anderson compares public access rights in England and the United States, and concludes that different social histories, landowning patterns, geography, and cultural mores, lead to different attitudes to public access.[237] Anderson's observations of America share parallels with other settler societies, such as Australia and New Zealand.

CRoW balances competing interests, private landowner versus public access, its objective being the creation of a functional mosaic of property pluralism in the open countryside. The Act does not institutionalize unrestricted access; rather it imposes measured restraints that do not 'interfere unduly with the landowner's privacy or business.'[238] Hence 'excepted land' excluded from

[231] A public advocacy group, The Coastal Coalition, leads the campaign; see http://www.nzcpr.com/CoastalCoalition.htm (May 30, 2011).
[232] Anderson, *supra* note 33, at 404
[233] Boast, above n 223, 6
[234] § 296 *Marine and Coastal Access Act 2009* (UK).
[235] John Sprankling et al, *Global Issues in Property Law* 88 (2006); Anderson, above n28, 402-5.
[236] Sprankling above n235, 90-93.
[237] Anderson, above n28, 418-421.
[238] Sydenham, above n32 88.

access includes cultivated land, or land within 20 metres of a dwelling.[239] Alternatively conditions are imposed on public conduct, a breach of which leads to the loss of rights of access. These include not closing gates, lighting fires, or disturbing persons engaged in lawful activity on the land.[240] Such a policy-based approach justifies the denial of access in the wider public interest. CRoW is a template for accommodating public and private property interests in landscapes where recreational access is desired or feasible.[241] A more extensive statutory right of access has been enacted in Scotland, a 'responsible right of access' to land and inland waters.[242] The Scottish scheme exemplifies that

> it is practically possible for a modern, democratic nation committed to the rule of law, the protection of private property, and open markets to create, if it wants, a property regime that to a considerable extent replaces the ex ante presumption in favor of the right to exclude … with an equally robust, but rebuttable, ex ante presumption in favor of access.[243]

'Settler' societies with different social, political and historic contexts[244] are less likely to generate the demands for similar access entitlements over private lands.

5.2 Inclusion and use and enjoyment

In the absence of direct legislative intervention, access is an inadequate (or at least premature) indicator of inclusion. Inclusion must embrace wider meanings than physical ingress and egress. Can public property be used and enjoyed without physical access? As discussed, the incorporeal conservation easement serves a multitude of 'public goods.' These include the provision of

[239] Schedule 1, *CRoW.* Landowners also have the right to exclude access for up to 28 days per year upon notice, section 22 *CRoW*.
[240] Schedule 2, *CRoW*
[241] Cf Jonathan Mitchell, 'What Public Presence? Access, Commons and Property Rights (2008) 17 *Social & Legal Studies* 351, 356.
[242] John Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2010) 89 *Nebraska Law Rev.* 739, 776.
[243] Ibid, 816-7
[244] Hostile reactions by adjoining landowners to the New Zealand Walking Access Act 2008 (NZ) watered down public access rights; Lovett, 817.

ecosystem services, 'viewsheds',[245] open space,[246] or wildlife corridors.[247] Inherent in each is an intangible and indirect public *enjoyment* absent access.

The right of use and enjoyment is described as hierarchically lower, 'less compelling' [248] than other significant property rights, in particular the right to exclude. Despite its importance, for example Tony Honore listed *use* as one of 11 critical incidents of ownership, 'surprisingly little is written about its content.'[249] While the private right is dominated by the descriptor of active *use*, its public equivalent may have a different emphasis, one where physical use is ancillary to a primary enjoyment. Alternatively, the public right may be conjunctive, a right of use **or** enjoyment. Where physical access is permitted, the public right may encompass both limbs - use and enjoyment - but where other indirect public benefits ensue minus access, the right falls away to one of enjoyment *simpliciter*. The umbrella right of inclusion is analogous to a diffuse public enjoyment of land, in which individual members of the public derive a public good, but where individual enjoyment of that good is no greater than any other member's enjoyment. Pointedly, access is a non-essential component.

In *Stop the Beach Renourishment,* public and private littoral rights intersected. While academic attention focused on the case's implications for the judicial taking of private property,[250] the U.S. Supreme Court decision also had resonance for public property, and its inherent *enjoyment*. There the 'public property right' to 'place a sand buffer on publicly owned submerged land…to protect coastal property owners and the community as a whole'[251] overrode any private right to future landward accretion. '[T]he (private) right to

[245] Seth McKee, 'Conservation Easements to Protect Historic Viewsheds: A Case Study of the Olana Viewshed in New York's Hudson River Valley', in J Gustanski and R Squires (eds.) *Protecting the Land: Conservation Easements Past, Present and Future* (2000).
[246] Brewer, above n38, 155; Debra Donohue, above n54*,* 119; Samuel Silverstone, 'Open Space Preservation through Conservation Easements', (1974) 12 *Osgoode Hall L.J.* 105.
[247] For example Ewing, above n 54.
[248] Laura Underkuffler calls the right to use 'less compelling, its 'protection is far more a matter of collective whim', Underkuffler, above n15, 25.
[249] Simon Douglas, 'The Content of a Freehold: A 'Right to Use' Land, in *Modern Studies in Property Law* (7th ed., 2013) 359, 360.
[250] Lucero, above n196.
[251] Echeverria, above n195.

accretions was … subordinate to the State's right to fill.' By contrast, in New South Wales, *Vaughan v Byron Shire Council* similarly concerned a right to fill. But in *Vaughan* the private landowner was demanding the right to renourish storm-damaged sea front, while the council asserted a public expectancy to future landward erosion, so-called 'planned retreat' against expected sea level rises arising from climate change. In Florida, an active public property right prevailed over a passive private right. In NSW, the reverse applied, a passive public property right yielded to an active private right. While public *enjoyment* in erosion retreat is nuanced, public *enjoyment* in accretion seaward of beach renourishment is more identifiable. The *enjoyment* facilitates a wider public good, namely the immediate protection of coastal communities. Equally, reasons for denying a public enjoyment (in *Vaughan* the council's policy of planned retreat) should satisfy an overriding public good, for as Carol Rose explains '[a]ny encroachment on public rights has to be justified by an even greater benefit to the public's well-being.'[252] Beach renourishment cases suggest that the *enjoyment* of public property rights requires a weighing up of relative 'public goods', straightforward in some cases, finely balanced in others.

The 'public good' is a malleable, circumstantial concept, periodically invoked to justify property in its various forms. Jeremy Waldron observes the paramountcy of a 'collective social interest' in defining collective property.

> In a system of collective property, the problem of allocation is solved by the application of a social rule that access to and the use of material resources in particular cases are to be determined by reference to the collective interests of society as a whole…resolved by favouring the use which is most conducive to the collective social interest.[253]

Richard Barnes concurs, '[t]he organizing idea of collective property is that the needs of society as a whole take precedence over those of individuals.'[254] What overarching 'public good' explains public enjoyment? Why should the

[252] Rose, above n181, 278.
[253] Waldron, above n117, 328.
[254] Ibid, 154.

public enjoy a general right to be included? *Propriety* offers the beginnings of at least one answer to these questions.

5.3 Inclusion and propriety

To Gregory Alexander, the commodity view of property is only one-half of the dialectic of modern property. The missing half, 'property as propriety', provides the 'material foundation for creating and maintaining the proper social order', a civic conception of a 'properly ordered society'.[255] Propriety enables the 'well-lived life',[256] in which individual interaction and reciprocity of social obligation within community constitutes 'human flourishing in a very deep sense.'[257] Human flourishing speaks to property's marginalized personal and communitarian values.[258]

> Flourishing is an unavoidably cooperative endeavor rather than an individual pursuit or purely personal project. Our ability to flourish requires certain basic material goods and a communal infrastructure ... However much we value our personal independence, it is quite literally impossible for a person to flourish without others.[259]

Public property in land is an important component in the propitious, well-ordered community. It is the 'communal infrastructure', the physical and metaphorical common ground, where shared activities 'socialize, democratize and educate society.'[260] Rose's evocative street market is testament to this. In its corporeal form, it provides space for egalitarian recreation.[261] In its incorporeal form, it may minimize the tragic risk of fragmentation,[262] or engender what Kevin Gray terms 'pedestrian democracy', a 'flourishing of the

[255] Alexander above n63, 2-3; Barnes, above n 120, 112.
[256] Gregory Alexander, 'The Social-Obligation Norm in North American Property Law', (2009) 94 *Cornell L. Rev.* 745, 763
[257] Ibid, 761
[258] Margaret Radin, *Reinterpreting Property* (1993); John Moutsakas, 'Group Rights in Cultural Property: Justifying Strict Inalienability' (1988-89) 74 *Cornell L.R.* 1179.
[259] GS Alexander and EM Penalver, *An Introduction to Property Theory* (2012) 87.
[260] Rose, above n6, 779, 781.
[261] J Laitos and T Carr, 'The Transformation on Public Lands' (1999) 26 *Ecology Law Quarterly* 178
[262] Eric Freyfogle, *Agrarianism and the Good Society* (2007) 9-24.

civil and ecological communities of which we humans are a part'[263] that heightens 'civic responsibilities and … participation in an integrative society of equals.'[264] By contrast, modern private property[265] marginalizes propriety. Its commoditization leaves scant scope for alternative paradigms, the likes of stewardship[266] or economies of nature,[267] to take root. Its abstraction de-couples right from place, preferring anonymous cartographic space[268] to the lived sociable experience of community.

James Kunstler's study of the decline of America's cities highlights the importance of public property to properly ordered communities. Kunstler writes of growing up in a soulless suburbia whose "motive force [was] the exaltation of privacy and the elimination of the public realm."[269] By contrast, summer camp visits to Lebanon, New Hampshire, with its 'town square, band shells, elm street trees, and various civic buildings of agreeable scale- the library, the town hall, the opera house' highlighted the lost dignity and consequence of public space.[270]

Public property forms a key part of 'organically whole communities.' Kunstler cites 'productive work, markets, cultural institutions, (and) different classes of people'[271] as critical to the social fabric. Public property informs to varying degrees many of these civil pre-requisites. Its facilitation of recreation, democratic values, and overarching sociability, (to be discussed next in turn) are factors that mold 'well-lived lives.' Rather than a false dawn for public access, the right to include may be best understood as a right to a proper social order, a right to inclusive enjoyment of a well-ordered community.

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[263] Kevin Gray, 'Pedestrian Democracy and the Geography of Hope' (2010) 1 *Journal of Human Rights*
and the Environment 45, 52.
[264] Ibid, 54.
[265] Cf, Freyfogle above n34, 177, 203.
[266] William Lucy & Catherine Mitchell, 'Replacing Private Property: The Case for Stewardship', (1996) 55(3) *CLJ* 566
[267] Joseph Sax, *Ownership, Property and Sustainability,*(2011) 14; Joseph Sax, 'Property Rights and the Economy of Nature' (1992) 45 *Stanford Law Review* 1433, 1446.
[268] Curt Meine, *Correction Lines Essays on Land, Leopold, and Conservation* (2004). Nicholas Blomley, *Unsettling the City: Urban Land and the Politics of Property* (2004) 91.
[269]Kuntsler, above n 82.
[270]Ibid, 13
[271] Ibid, 48

The links between recreation[272] and public lands are many, ranging from practical to ethereal, passive to active, and co-existing to competing. There is near academic unanimity in the U.S. that recreation replaced commerce as public property's socializing *raison d'etre* by the second half of the 20th century.[273] 'Dispersed recreation… the opportunity to hunt, fish, hike, explore…'[274] constitute new reasons to retain public lands. Sally Fairfax describes the American public estate 'riding into a different sunset',[275] with once alternative ideas (relaxation, health, adventure, exploration, social, scenic and natural values, solitude and spiritual replenishment) becoming mainstream. Joseph Sax explores the spirituality of passive recreation, tracing the origins of the parks system to landscape architect Frederick Law Olmsted and his 'contemplative visitor', the non-consumptive recreationist whose reflections on nature 'provide a chance to express distinctiveness and to explore our deeper longings.' [276] Scott Lehmann similarly writes of the restorative qualities of public lands, places that 'take us out of ourselves, … release us from unrewarding preoccupations while
at the same time engaging our interest and curiosity.'[277] Such observations are redolent of property's ancient role of identity.[278]

Ideologically, public property reinforces democratic values,[279] a 'powerful symbolic affirmation of the egalitarian ideal in a largely private system.'[280] Olmsted views the urban public park as 'particularly helpful for democratic values… rich and poor would mingle… and learn to treat each other as

[272] Recreation on public lands is treated as a natural resource as much as mining, forestry or grazing, George Coggins et al, *Federal Public Land and Resources Law* (6th ed, 2007).
[273] 'Following World War II, recreation demand boomed as the country's population became larger, richer, and more mobile.' Herman D Ruth & Associates, 'Outdoor Recreation Use of the Public Lands', *Report prepared under contract with the Public Land Law Review Commission,* Berkeley, CA, 1969, Vol. I, [I-5].
[274] Nelson, *supra* note 28, 211, 240; Coggins above n272*,* 907.
[275] Sally Fairfax, 'Riding into a Different Sunset', (1981) 79 *Journal of Forestry*; Anderson, above n28*,* 413-416.
[276] Joseph Sax, *Mountains Without Handrails, Reflections on the National Parks* (1980) 42.
[277] Lehmann, above n22, 170.
[278] Laitos & Carr, above n261.
[279] Joseph Singer, 'Democratic Estates: Property Law in a Free and Democratic Society', (2009) 94 *Cornell L. Rev.* 1009.
[280] Nelson, aboven 24, 213.

neighbors.'[281] Andrew Buck identifies egalitarianism as the distinguishing feature of Australian property law,[282] hastened by the opening of the Crown estate for settlement after 1861.[283] In New Zealand an ethos of open access to land and natural resources,[284]was manifested by indicators such as public rights to fish and game,[285] and the convention of public access to the outdoors. In settler societies, egalitarianism is a powerful sub-current that finds outlet and expression in public property.

Finally public property fills a gap in the narrative of property ignored in a private commoditized paradigm, that of sociability.[286] Rose's 'comedy of the commons' has been previously traversed as an overarching rationale for public property. At its base is the need for public property to serve society by making us sociable.[287]

Public property is critical to the social and communal fabric. It fills the void vacated by a commoditized private property, such that Alexander's theory is optimally *public* property as propriety. Rather than a false dawn for access, the right to include may be better understood as a universal entitlement to flourish in well-ordered communities, places symbolized by Rose's deeply expressive streetscape. Public property enables well-lived lives by acting as an 'entrance to community'[288], the vehicle through which public inclusion imposes and legitimizes the idea of public property rights in land.

[281] Rose, above n6.
[282] Andrew Buck, *The Making of Australian Property Law* (2006)
[283] *Crown Lands Act 1861* (NSW)
[284] Nigel Curry, 'Rights of access to land for outdoor recreation in New Zealand; dilemmas concerning justice and equity', (2001) 17 *Journal of Rural Studies* 409.
[285] The ethos and principles of the early Acclimatisation Societies (forerunners to the NZ Fish and Game Council) were to keep freshwater fisheries and wildlife game in the public estate, s 23 *Wildlife Act 1953* (NZ), s 26ZN *Conservation Act 1987* (NZ).
[286] Graham, above n29.
[287] Rose, above n6.
[288] Eduardo Penalver, 'Property as Entrance' (2005) 91 *Virginia Law Review* 1889.

6. Conclusion

While some advocates for public property may argue for its greater 'public-ness',[289] it has been an objective of this chapter to highlight the little-regarded 'property' in the equation. In so doing, diverse interests in public land have been explored; vexed issues of ownership canvassed; and aspects of inclusion laid open to initial scrutiny.

Structure, sophistry and coherence should be our ambitions for public property in land, such that we 'see' more clearly and better understand the vast public estate that exists in our midst. [290] If such a descriptive 'seeing' becomes normalized, property in land will be enriched by the greater diversity that ensues, the addition of an undisputed and commensurately valued public tile in the mosaic.

[289] Project for Public Spaces at http://www.pps.org (May 30, 2011).
[290] In the western United States, there is widespread teaching of Public Land Law, Earl Arnold, 'The Study of Public Land Law in the Western Law Schools', (1916) 4 *Cal. L. Rev.* 316. In Australia and New Zealand, there is a dearth of public land literature. In NSW there has not been a book on public lands since 1973, Andrew Lang, *Crown Land in New South Wales: the principles and practice relating to the disposal of and dealings with crown land* (1973). In New Zealand it is 1967, J O'Keefe, *The Law and Practice Relating to Crown Land in New Zealand* (1967).

Chapter 3 The Obviousness and Obliviousness of Common Property

1. Introduction

Common property is arguably the greatest victim of private property's dominance. It is 'seen' (if at all) as marginal, tragic, or anachronistic,[1] yet American property jurist Carol Rose describes it as 'oddly ubiquitous',[2] a paradox where common property is *obvious* in its frequency, but *oblivious* to precise identification.

This chapter will examine traditional and contemporary manifestations of common property, and the theories and myths that surround its application to natural resource management. These diverse perspectives reveal that common property has much to add to a vibrant property mosaic, a putative contribution disproportionate to its apparent size or profile. The chapter will then assess common property's understated strengths, the centrality of use rights, an inherent sociability, and its environmental norms and values, before concluding with its overstated weaknesses, its tarnished image and near-invisibility.

That we 'see' common property through the overblown prism of its 'failures' has pushed it to the periphery. Yet to dismiss it as marginal is to overlook its potential. It also ignores that common property is more 'obviously there' than our obliviousness to it suggests. The identification of common property in any given landscape requires a consciously concerted effort that rewards the viewer with an enriched mosaic of property types.

[1] The 18th century enclosure movement exemplified this phenomenon in terms of common property. As a consequence, common property is criticized as economically inefficient, socially improper, or a "tragedy of the commons" waiting to happen.
[2] Carol Rose, "The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems", (1998-1999) 83 *Minn. L. Rev*. 129, 132.

2. Traditional common property

Common property in its traditional form was, and remains, intrinsically linked to an agrarian, village-based, pre-industrial conception of society. In England, 'common land had a significant role in …agricultural life',[3] and remains most prevalent outside metropolitan areas.[4] In Europe, ongoing common property models have been studied as irrigation cartels in rural Spain[5] and centuries-old land tenure patterns in isolated mountainous cantons in the Swiss Alps.[6]

Common property rights in 18th century England were described as

> The interest which a commoner has in a common is…to eat the grass with the mouths of his cattle, or to take such other produce of the soil as he may be entitled to… The soil itself, the land, was not the commoner's but the use of it was. That use…was common right. Its history had important consequences for small landholders, rural artisans and landless labourers in 18th century England….their very sense of who they were and how well they lived were all in part dependent on [it]…[7]

Common lands reflected the (once) central importance of agriculture to the English economy, in particular the open-field system of agricultural practice. Common lands since Norman times comprised the 'waste lands of the manor', uncultivated, unenclosed lands outside the lord's individual *demesne,* or lands held by tenants under copyhold or customary freehold tenure.[8] Rights of common are legal interests in land, incorporeal hereditaments in the nature of profits a prendre ('profits'), a non-possessory right to enter someone else's

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[3] Navjit Ubhi & Barry Denyer-Green, *Law of Commons and of Town and Village Greens* (2004) 4

[4] Common land in 2004 comprised 'some 550,000 hectares – about 4% of the total land area in England and Wales…. Surprisingly just over 51% of all registered commons in England are less than 1 hectare in area, and only 1.3% are 1,000 hectares or more in area. Just over half of England's common land is in Cumbria and North Yorkshire.' Ibid.

[5] Elinor Ostrom, *Governing the Commons The Evolution of Institutions for Collective Action* (1990) 69-82.

[6] Robert Netting, *Balancing on an Alp: Ecological change and continuity in a Swiss mountain community* (1981).

[7] J M Neeson, *Commoners: common right, enclosure and social change in England, 1700-1820* (1993) 1

[8] Ubhi & Denyer-Green, above n3, 34-5

land and remove some thing or produce off that land. As the authoritative text *Gale on Easements* points out, while all rights of common are profits, not every profit is a right of common, since some profits may be enjoyed individually, or severally with others, not necessarily in common with a defined class.[9]

Traditional Anglo common law common rights are capable of classification into one of four categories: rights of common appendant;[10] rights of common appurtenant;[11] rights of common in gross;[12] and rights of common by reason of vicinage.[13] Since 1970, rights in common in England must be registered to remain valid and enforceable under the *Commons Registration Act 1965* (UK), thus rendering these categories (for all practical purposes) obsolete.[14]

Importantly common rights are not public property rights[15], they vest in members of a locality, or to a defined class of persons within that locality, and operate as 'legal rights over the surface of lands, exercise(d) together or in common.'[16] Thus strangers from outside a locality are not entitled to access common lands, or exercise privileged use rights.[17] A third party (historically the manorial lord, but now often local borough councils) holds title, and their use of the land is assured in common with that of the commoners. While use rights such as pasturage are the most prevalent[18], other common rights include the gathering of wood, turf, or gorse for heating,[19] the gathering of

[9] *Gale on Easements* (17th ed, 2003) 1-129
[10] Rights of common annexed to lands by operation of law that existed as at *Quia Emptores 1290.*
[11] Rights of common attached to a particular parcel of land.
[12] Rights of common not attached to any particular parcel of land.
[13] Permissive rights of common that arise when two common lands adjoin or are contiguous
[14] Ubhi & Denyer-Green, above n3, 85-109
[15] Cf W. G. Hoskins and L. Dudley Stamp, *The Common Lands of England & Wales* (1963) 4, 81.
[16] Ibid, 4
[17] Unless statute otherwise permits access, *Countryside Rights of Way Act 2000* (UK)
[18] *Pasturage* generally referred to 'cattle', being animals needed to plough the land (horses), or animals needed to manure the arable land, such as *cattle proper*, and sheep. Variants to *pasture* include vesture and herbage. Rights of pasture could be limited to specific numbers of cattle through 'stinting', Neeson, above n7, 114. Alternatively on some lands, rights of pasture could only be exercisable at specified times of the year ('commonable lands'), Ubhi & Denyer-Green, above n3, 27-30. Pigs (pannage), geese, and goats were separate common rights.
[19] Turbary.

timber for repair of fences and houses[20], fishing in common streams,[21] access across the countryside,[22] the gleaning of crops,[23] the gathering of wild foods such as nuts, mushrooms and berries, and recreational uses, including rights of air and exercise.[24] The diversity of common rights varies according to local custom and usage. 'In reality on the ground, the range of common produce was magnificently broad, the uses to which it was put was minutely varied, and the defence of local practice was determined and often successful.'[25]

The commons were also more than a platform for natural resources; they were an integral component of community. As Jeanette Neeson surmises, common rights had deeper social meaning and implication. '[T]he broad relationships engendered by independence of the wage enhanced leisure and community time, while access to the openness of the commons brought solitude…each usage of common waste created a sense of self; it told commoners who they were, a part of a tribe.'[26] The common lands themselves were 'literally and metaphorically common ground', a space where 'contact, familiarity and exchange' established connections between commoners and others of mutuality and respect.[27]

The enclosure movement that culminated in the late 18th and early 19th centuries represented the loss of much customary common right, and more broadly the wholesale transfer of property rights from the community to the individual, and from the landless to the landed.[28] It also triggered social upheaval, emigration and demographic change, and as argued more broadly in this thesis, a fundamental realignment of our conception of property. Yet

[20] Estovers (including house-bote, cart-bote and hay-bote).
[21] Piscary.
[22] 'To local people almost entirely employed in agriculture…there simply was no notion of rights of access onto the common separate from the rights and incidents of rights of common. With the massive urbanisation of the 19th century, and the disengagement of many people from agricultural activities, many commons came to be seen to have separate or additional recreational purposes.' Ubhi & Denyer-Green, above n3, 133.
[23] The collecting of the remains of a harvest left in the fields.
[24] Customary activities include cricket, Morris dances, and village fairs. Hoskins and Stamp, above n15, 4.
[25] Neeson, above n7, 313.
[26] Ibid, 180.
[27] Ibid, 182.
[28] In 1963 a Royal Commission on Common Lands reported there were 1.5 million acres of commons in England and Wales, Hopkins & Stamp, above n15.

elsewhere in Europe common property rights proved more durable, in the forests and meadows of alpine communities, common property remains a functioning component of social and economic activity.

Anthropologist Robert Netting studied a 'closed corporate community', the village of Torbel in alpine Switzerland in the early 1970s, and 'the ecological balance achieved between its inhabitants and the environment.'[29] Netting described a patchwork of private and communal tenure that had existed from the mid 15th century, a deliberately planned and inter-connected pattern of land ownership that achieved an ecological and economic equilibrium 'created and maintained by intensive human effort for the physical benefits it could confer…private good and gain are weighed against village well-being and security.'[30]

Village-owned common property in Torbel generally comprises less productive higher altitude holdings,[31] pastures used for summer grazing, and alpine woodlands managed sustainably for annual fuel and timber needs. Common property also includes usufructs over alpine passes, used historically for inter-village access, hunting, the collection of stones for foundations and roofing slate, and the cutting of alpine grasses as a fodder supplement. Rights to common property, dating from 1453, are restricted to citizens of Torbel. Non-citizens who acquired private land in the village did not necessarily obtain common rights, while citizens who sold their private property in the village relinquished their common rights. 'Although outsiders could be admitted at the pleasure of the community, competition for obviously scarce resources was decisively restricted. The definition of citizenship was equivalent to erecting a barrier around the community.'[32] The village rigorously self-managed and policed individual access to communal resources, such that in the 1970s at the time of Netting's extended stay at Torbel, there was no evidence of any 'tragedy of the commons'. Rather,

[29] Netting, above n6, (vii).
[30] Ibid, 225.
[31] '[T]he high mountain catchment basin of Torbel's principal irrigation stream also was treated as common land,…guarding the vital water rights of the village.' Ibid, 68.
[32] Ibid, 60.

'common holdings and corporate administration by the village promote three things; an efficiency of utilization that would be threatened by fragmented private ownership, the potential for maintaining yields by enforced conservation; [and] the equitable sharing of necessary resources by all group members.'[33] Netting concludes that

> [t]he Torbel case…reflects a situation in which clearly differentiated individual property and communal property exist side by side….. It appears that the historic persistence of both types of property in a single community must be explained in ecological terms rather than solely as a projection of certain cultural or ethnic origins or the artefact of some system of legal ideas.[34]

In the New World, traditional common property found little traction in emerging colonial societies. In New South Wales, despite commons being set aside from 1804 to satisfy the need for grazing lands in populous districts,[35] early settlers demonstrated scant interest in common title. A seemingly limitless frontier available for freeholding, an alien social context, and recent memories of displacement from common lands in England or Scotland, rendered common title a brief footnote in the history of settler land tenure. As John McLaren observes

> For people denied customary rights and displaced from the enjoyment of rights in common, the prospect of securing the clearest and most durable of rights over land in the colony, 'their land', must have proven seductive and seemed necessary to their survival and prosperity.[36]

Nonetheless in New South Wales, the legislature has considered the remnant tenure worthy of retention; the *Commons Management Act 1989* (NSW) is the

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[33] Netting, above n6, 63.
[34] Ibid.
[35] Enid Campbell, 'Rights of Common in New South Wales: A History', (2007) 11 *Legal History* 243, 246.
[36] John McLaren, 'The Canadian Doukhobors and the Land Question: Religious Communalists in a Fee Simple World' in *Land and Freedom: Law property rights and the British Diaspora* (2001) 135.

current statute that regulates about 200 commons in that state.[37] When the bill was debated in 1989, the original rationale for commons was explained on the basis that

> The commons had originally been created, and the permitted uses of them had been defined, at a time when people living in villages and towns had no way of having their milk delivered to them, and nowhere to retain a horse for their transport. The commons attached to the villages or towns were used for milking cows, maintaining food supplies, ... keeping horses for transport and for providing a source of fuel for local agricultural labourers.[38]

Original uses such as grazing and watering of stock persist, but more contemporary rationales include recreation. Use of commons is restricted to persons who meet defined eligibility criteria to be entered on a commoners' roll[39], usually town residents or nearby farmers. Non-commoners are effectively strangers to the use of the land, and their unauthorised use of the commons is enforceable through trespass. Commoners elect a 'commons trust', which manages the common, and establishes by-laws and management plans.[40]

In the United States, particularly in the northern New England,[41] local common rights developed informally. As Eric Freyfogle describes, early America was a 'polyglot world, in terms of the legal ideas, and land-use and land tenure practices that people brought with them across the Atlantic.'[42] As a form of customary practice, local residents in the New England[43] thus used unenclosed rural lands for open grazing, hunting, fishing, and collecting firewood and berries, in ways understood as common practice in their 'home

[37] Campbell, above n35, 244.
[38] Ibid, 260-1.
[39] Sections 10 & 12 *Commons Management Act 1989* (NSW)
[40] Part 2 *Commons Management Act 1989* (NSW)
[41] In the United States, common property is said to survive in 'property niches'. Historically it existed 'in the form of woodlots and pastures in New England and the antebellum South, and among the Hispanic and Indian communities of the Southwest.' Charles Geisler, 'Property Pluralism', in *Property and Values: Alternatives to Public and Private Ownership* (2000) 72-3.
[42] Eric Freyfogle, *On Private Property Finding Common Ground on the Ownership of Land* (2007) 53, 29-60.
[43] Freyfogle argues that a large proportion of early immigrants were Celts, who had a disrespect for the English common law of property, Ibid.

country'. However common rights were insecure and short-lived, by the mid-19th century courts

> [l]ooked askance at customary practices that were not in line with the common law and its clear definition of trespass. They were particularly suspicious of customary arrangements in which multiple people had rights to use the land at the same time…. Local customary practices became suspect. The common law, including a nearly full right of landowners to exclude, was gaining the upper hand.[44]

Traditional common property is captive to both its rich and ancient social history, and its agrarian, pre-industrial settings. It may be legally 'frozen' in the uplands and village greens of rural England, across small country towns in New South Wales, or balancing on a Swiss Alp. Yet the 'idea' of traditional common property has potential to escape these confines, and take root in more modern forms and contexts. And as Eric Freyfogle predicts, one optimistic image of modern property may be a variant of the 18th century agrarian model, 'a community, or ecological vision … given that it protects lands and communities while encouraging lasting ties between people and places.'[45] The concept of modern limited common property, a model that builds on its historical antecedent, is next considered.

3. Modern limited common property

Carol Rose argues that we need to consider and refine our thinking about 'limited common property', a property type that was 'neither entirely individualistic nor entirely public'. Rose defines 'limited common property' as property 'held as a commons among the members of the group, but exclusively vis-à-vis the outside world. '[46] This 'inside commons/outside private property' structure is the key to a wider 'seeing' of modern limited common property. We are oblivious to the ubiquity of limited common

[44] Ibid, 54.
[45] Eric Freyfogle, *The Land We Share: Private Property and the Common Good,* (2003) 37-38.
[46] Rose, above n2, 132.

property[47] because we are conditioned to 'see' only the private external shell.[48] As a consequence, we tend to ignore the significance of the 'inside commons'. This oversight is not surprising, the march of private property has meant that '[t]he common law tradition is not entirely friendly to group rights.'[49]

Yet this preoccupation disguises the fact that individual private title has a capacity to accommodate communal rights. Alvin Esau's observation is made in the context of the communal title of religious communities in North America, but it has wider implications.

> While we conceive of the law as flowing out of concerns to protect individuals rather than groups, …our law actually displays a "deep reverence for the group, as long as it assumes corporate or quasi-corporate form." By incorporating, the group right can be articulated as an individual property right and this group right can be vindicated in the law. In corporate or trust form, communal property becomes compatible with fee simple.[50]

Esau's articulation of the 'inside commons/outside private property' dichotomy (in the case of North American Hutterite communities) allows'[t]he drafting of corporate constitutions and by laws to put inside-law communal norms into the form of outside-law … arrangements.'[51] Taking this dichotomy as a guide, limited common property materializes more readily. Inner-city company title units,[52] ski lodges,[53] surf life saving clubs,[54] community gardens,[55] or a floor

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[47] Ibid.
[48] J W Hamilton & N Bankes, 'Different Views of the Cathedral: The Literature on Property Law Theory' in *Property and the Law in Energy and Natural Resources,* (2010) A McHarg et al (eds.) 36
[49] Carol Rose, 'Property and Language, or the Ghost of the Fifth Panel' (2006) 18 *Yale Journal of Law and the Humanities* 1, 13.
'On the other hand, American legal institutions have generally been quite friendly to the category of collective property [called] "liberal common property"…non-public collective properties in which the members may participate in somewhat formalized "private government" and in which they always retain the ultimate protection of exit.' Examples include corporations, cooperatives and condominiums, that 'courts have supplied a body of common law for their governance.' Carol Rose, 'Left Brain Right Brain' (2000) *Oregon Law Rev.* 485, 486-7.
[50] Alvin Esau, 'The Establishment and Preservation of Hutterite Communalism in North America, 1870-1925', in *Despotic Dominion Property Rights in British Settler Societies*, John McLaren, Andrew Buck & Nancy Wright (eds.) (2005) 217-218.
[51] Ibid, 209.
[52] Peter Butt, *Land Law* (6th ed, 2010).

of barrister's chambers[56] all exemplify the potential for modern limited common property. Carol Rose argues that non-public collective property is all around us, 'many of us live in co-ops and condominiums, [and] most of use belong to institutions that collectively own property – clubs, churches, and the like.'[57] All share a structure where internalized common use rights of 'community' members lie beneath the surface of private fee simple title. [58]

In essence, the defining feature of modern limited common property is its *structure.* Specifically, title vested in an external entity (typically incorporated) with member *use* rights a consequence of entity membership. Thus in inner-city company title units, a company holds the real property title. Individual shareholders enjoy rights of use, exclusive rights of occupancy over the unit to which the share relates, and shared use rights to lifts, foyers, and other common areas. By contrast, strata title apartments remain substantively private property, as the ownership structure is dominated by individual fee simple titles. However body corporate-owned facilities in the apartment complex[59] may constitute modern limited common property, such that the typical property 'split' is one of dominant private/peripheral common.

Conversely, the *use or purpose* of the property holding does not characterize modern limited common property. If, as asserted, company title units, ski lodges, surf life saving clubs, community gardens, or barrister's chambers, each exemplify the potential for modern limited common property, such divergence of use defies any 'common purpose' definition. Nor is modern limited common property necessarily contingent on the *number* in the

[53] For example, the Peninsula Ski Club Inc. owns the Peninsula Ski Club in Mt. Hotham, Victoria. Formed in 1975, ownership of debenture stocks in the association entitles members to use rights over the ski lodge, built on subdivided Crown leasehold. The lodge comprises unallocated member's accommodation, a communal kitchen, dining area, lounge, and other common facilities, such as a dry rooms and laundry.
[54] Ann Brower and John Page, 'Property Rights Across Sustainable Landscapes: Competing Claims, Collapsing Dichotomies, and the Future of Property', in David Grinlinton and Prue Taylor (eds.) *Property Rights and Sustainability; The Evolution of Property Rights to Meet Ecological Challenges* (2011) 305-321.
[55] For example managed by incorporated associations.
[56] Legal historian Wilfred Prest's observation to the author, personal conversation, December 2009.
[57] Rose, 'Left Brain Right Brain' (2000) *Oregon Law Rev.* 485
[58] Rose, above n2, 155.
[59] Such as lifts, gardens, pools, driveways, stairwells, visitor parking bays.

communal group. It is the universal nature of the common use right that is critical (albeit subject to internal variance[60]), a unity of 'ownership' with some analogy to a private joint tenant's 'four unities' of possession, interest, time and title.

Property academic Robert Ellickson extends the concept of modern common property beyond structure, or the need for any formal external entity, corporate or otherwise. Ellickson's study of the property-like norms of the 'household',[61] yield original observations about common property by focusing on the content and substance of relevant domestic arrangements. Ellickson sees 'common property' in shared dormitory rooms, and describes multi-person households as limited-access 'commons', with complex mixes of private and common space.[62] Ellickson's expansive model illustrates that modern limited common property is remarkable for its ubiquity and unseen incidence.

4. Common property – the natural resource perspective

Garrett Hardin published a seminal work in 1968[63] that gave enormous impetus to an assumption that common property regimes were inevitably and remorselessly on a trajectory towards tragedy. The 'tragedy of the commons' describes the 'degradation of the environment to be expected whenever many individuals use a scarce resource in common.'[64] Hardin exemplifies the tragedy by describing the 'rational' herder of cattle, who overstocks an open access pasture by adding more and more cattle. Hardin argues that the individual rational herder's self-interest is served by increasing the number of cattle feeding on the pasture. Conversely any loss occasioned by the deterioration of the paddock is delayed and dispersed amongst all herders using the resource. In short, the herder's individual benefit from overstocking outweighs the shared cost of loss of productivity. And 'what is true for one

[60] For example, 'stinting' in traditional common property.
[61] Robert Ellickson, *The Household: Informal Order Around the Hearth* (2008).
[62] Ibid, 117-9.
[63] Garrett Hardin 'The Tragedy of the Commons' (1968) *Science* 162.
[64] Ostrom, above n5, 2.

grazier is also true for others: each has an incentive to drag down the pasture as a whole.'[65]

> Therein lies the tragedy. Each man is locked into a system that compels him to increase his herd without limit- in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.[66]

Hardin's solution to averting the tragic outcome of common property involves either privatization of the resource, such that market forces ordain its best and highest use, or state intervention to directly and centrally regulate the resource. The clear inference is that common property is an inferior and tragic tool for resource management. Hardin's terminology of the 'tragedy of the commons[67]' has passed into everyday use, and further entrenches an institutional bias against the commons that can be traced to the enclosure period, when the privatization of so-called 'waste-lands' was lauded a victory for efficiency and modernity in improvement discourse.[68]

Elinor Ostrom rose to prominence by challenging the 'remorseless' inevitability of Hardin's thesis. Ostrom placed Hardin's tragedy in context, as a work influenced by powerfully similar theories in vogue in the 1960s and 1970s. In particular Ostrom cites the Prisoner's Dilemma game, a theory that provoked intense academic interest,[69] and Mancur Olson's 1965 book *The Logic of Collective Action*. Prisoner's dilemma involves resource users embarking on rational strategies that lead to third-best outcomes, more formally known as 'Pareto-inferior equilibrium outcomes'.[70] The appeal of the theory lies in the paradox of rational decisions leading to irrational outcomes, an end-result not dissimilar from an inevitable, fatalistic tragedy. Similarly,

[65] Freyfogle, above n45, 158.
[66] Hardin, above n63, 1244.
[67] Ostrom argues that Hardin was not the first to coin the term, Ostrom, above n5, 2-3.
[68] Nicole Graham, *Lawscape: property, environment, law* (2010) 51-84.
[69] Ostrom cites more than 2,000 articles devoted to prisoner's dilemma theory by 1975, Ostrom, above n5, 5.
[70] Ibid, 3-5.

Mancur Olson's work affirms the rational supremacy of individual self-interest over collective good.

> Unless the number of individuals is quite small, or unless there is coercion, or some other special device to make individuals act in their common interest, rational self-interested individuals will not act to achieve their common or group interests.[71]

Olson's basic premise is that a participant in the use of a natural resource, who cannot be excluded from the benefits of a collective good, has no incentive to contribute voluntarily to that collective good. Olson's rational actor bears strong analogy to Hardin's rational herder.[72]

Ostrom offers an alternative to Hardin's 'either/or' private or state answer to averting the tragedy. Ostrom's 'third way' to resolve the commons problem is common property itself, successful *common pool resource* (CPR) institutions that defy the erstwhile logic of unremitting environmental degradation, and act as an effective tool for natural resource management. Ostrom identifies a number of successful CPR institutions[73] (including the Swiss village of Torbel studied by Robert Netting[74]) that escape the rigidity of Hardin's public/private divide, and mirror the argument for property plurality. 'Institutions are rarely either private or public – "the market" or "the state". Many successful CPR institutions are rich mixtures of "private-like" and "public-like" institutions defying classification in a sterile dichotomy.'[75]

In trying to discern what made some CPRs 'long enduring' and 'robust', and others not, Ostrom identifies and analyses seven factors that help successful CPRs break the 'shackles of a commons dilemma.'[76] They are: *clearly defined boundaries* that 'close' the common area and the rights of users to extract

[71] Mancur Olson, *The Logic of Collective Action* (1965) 2.
[72] The supremacy of the rational actor has since been challenged, with altruism or 'uncommon decency' Joseph Singer, *The Edges of the Field Lessons on the Obligations of Ownership* (2000) pp. 1-17.
[73] Ostrom, above n5, 58-102.
[74] Described as communal tenure in high mountain meadows and forests.
[75] Ostrom, above n5, 14.
[76] Ibid, 21.

common resources; a *convergence* between use rights and prevailing local conditions; non-static *collective-choice arrangements* that allow the modification of resource rules as exigency demands; effective *self-monitoring*; *graduated sanctions* for users who violate resource rules, enforced by other users or the collective community; low-cost *conflict-resolution mechanisms*; and *minimal external interference* in the community's self-governance and self-enforcement.[77] The simplicity of Ostrom's research lies in its isolation of the key indicators of functionally healthy common property arrangements.

Ostrom's defence of common property builds on an earlier rejection of the universality of Hardin's tragedy thesis in an article by Ciriacy-Wantrup and Bishop in 1975. Ciriacy-Wantrup and Bishop develop a conceptual framework for common property, defining it as 'a distribution of property rights in resources in which a number of owners are co-equal in their rights to use the resource,'[78] and then use this definitional framework to attack a fundamental flaw in Hardin's argument, his equating of the open access commons with the internally regulated commons. 'Common property is not "everybody's property."… [to confuse the terms is to] slur fundamental institutional relationships.' [79] Ciriacy-Wantrup and Bishop further argue that the evidence of economic history of common property is not the inevitable tragedy that Hardin's 'herder analogy' alleges, but a mixed bag of success and failure. Indeed common property can be helpful for modern problems of natural resource policy. 'Common property, with the institutional regulation it implies, is capable of satisfactory performance in the management of natural resources, such as grazing and forest land, in a market economy.'[80] Common property overcomes many problems of private property; it delivers a larger spatial perspective in land management,[81] it may be more suited to certain

[77] Ibid, 90-101.
[78] S Ciriacy-Wantrup & R Bishop, 'Common property as a concept in natural resources policy', 15 (1975) *Nat. Resources J.* 713, 714.
[79] Ibid, 715.
[80] Ibid, 721.
[81] Freyfogle, above n45, 99. Freyfogle uses as an example the 'Tilbuster Commons' on the Northern Tablelands of NSW, where 'private landowners lease their private lands to a collectively managed grazing co-operative. Their combined lands are worked in concert – like open field farms of centuries ago- with their animal herds mingled.' Freyfogle at 100; Sima

physical locations, or 'there may be limitations of human administration [or] technology that make individual propertization difficult.'[82]

Many scholars[83] have subsequently criticized Hardin's tragedy thesis on the basis of either or both of these two flaws: the confusion between open access and limited commons, and the simplistic 'glossing over' of successful commons management precedents. Eric Freyfogle comments

> Other scholars had spent lifetimes studying common property regimes, including common grazing lands, and they knew full well that common property arrangements sometimes worked just fine, with nothing like the tragedy Hardin predicted. What Hardin had described was essentially an open-access commons, one in which outsiders could show up at any time and start using it or in which existing users could increase their use at will.[84]

Similarly Doris Fuchs refers to

> Literature on common property resources [that] provides empirical evidence against a necessary link between common pool resources and collective failure. This literature emphasizes that Hardin's tragedy of the commons generally applies to open-access resources, but often is not the outcome for common property resources. Numerous case studies …illustrate that groups of appropriators can jointly and sustainably manage natural resources.[85]

One 'upside' of the natural resource perspective on common property is the insight it provides into successful common property regimes. Elinor Ostrom's seven factor analysis has been previously traversed. Doris Fuchs similarly

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Williamson et al, *Reinventing the Common: Cross-Boundary Farming for a Sustainable Future* (2003).

[82] Rose, above n2, 139.

[83] Margaret Davies, *Property Meanings, Histories, Theories* (2007) 73; Edward Barbanell, *Common Property Arrangements and Scarce Resources: Water in the American West* (2001) 112; Lee Godden, "Communal Governance of Land and Resources as a Sustainable Property Institution', in David Grinlinton and Prue Taylor (eds.) *Property Rights and Sustainability; The Evolution of Property Rights to Meet Ecological Challenges* (2011) 249-272; Carol Rose, 'Environmental Lessons', (1993-1994) 27 *Loyola of Los Angeles Law Review* 1023, 1025.

[84] Eric Freyfogle, *Agrarianism and the Good Society* (2003) 160.

[85] Doris Fuchs, *An Institutional Basis for Environmental Stewardship: The Structure and Quality of Property Rights*, (2003) 59-60.

identifies related factors that 'foster the ability of joint appropriators from a resource to overcome collective action problems', including group homogeneity, the presence of leadership, the ability to exclude outsiders, and an ability to communicate and learn.[86] Eric Freyfogle talks of responsive institutions, succession planning, and 'a fundamental precept: a commons regime can only work if the vast majority of local residents view it as fair and only if they sense they have voices in its management.'[87] Robert Ellickson's study of American pioneer settlements emphasizes group efficiency, he concludes that common property is more efficient for so-called 'large events', for reasons of increased returns to scale and the spreading of risk.[88] Such insights in turn instill confidence in others to advocate the common property model as a solution to resource scarcity. Thus Edward Barbanell recommends common property as a sustainable resource management tool for water security in the Colorado River basin in America's West.[89] Similarly Evan van Hook advocates the 'ecocommon', a common property management model for sensitive ecosystems and buffer zones adjoining resource-dependent communities.[90]

Another 'upside' is the clarity it brings to conceptual definitions of common property. When emphasis is placed on the exploitable resource, and the rights of eligible appropriators to access that resource, coherent definitions of common property, and common property rights, ensue. This clarity minimises the risk of misunderstanding, and elevates common property from esoteric curiosity to feasible alternative. Fuchs defines common property as 'resources for which the exclusive title is in the hands of a group of individuals. This group has control over access to the resource, is frequently backed in this capacity by the state, and has general decision-making capacity over the resource.'[91] Barbanell's definition is ' a state of affairs where (only) the members of the resource community have limited rights to

[86] Ibid, 60.
[87] Freyfogle, above n45, 172.
[88] Robert Ellickson, 'Property in Land' (1993) 102 *Yale L.J.* 1315, 1322-1323.
[89] Barbanell, above n83.
[90] Evan van Hook, 'Note, The Ecocommons: A Plan for Common Property Management of Ecosystems', (1993) 11 *Yale L. & Pol. Rev.* 561.
[91] Fuchs, above n85, 49.

use the resource, and where such limits are determined by a process of collective choice…[made] by members of the resource community.'[92] Contrast these resource-premised definitions to traditional articulations such as 'rights of commoners… to eat the grass with the mouths of his cattle.' Common property is transformed from museum exhibit to viable property option through the prism of natural resources.

The obvious 'downside' is the oft-cited, instantly recognizable tragedy of the commons. Like William Blackstone's 'sole and despotic' trope, Hardin's noetic 'tragedy' taints common property with its broad–brush application, and overwhelms the detail of any counter-argument. For example, William Lucy and Catherine Mitchell's argument for the replacement of private property by a notion of 'stewardship' rejects common property as a viable alternative because it is 'almost as problematic when applied to land … as private property.'[93] Lucy and Mitchell canvass both a 'strong' and a 'weak' common property,[94] the 'strong' version features unrestricted use with attendant risks of 'over- consumption, over-use or pollution.'[95] The 'weak' interpretation entails some regulation of access, but the authors conclude that 'we do [not] know of any account of common property that fills this gap.'[96] For Lucy and Mitchell the myth of tragedy is all consuming. Dealing with this powerful yet misleading narrative is a burden which modern common property must accommodate. The dominant discourse of common property overstates its weaknesses and understates its strengths. To restore balance, common property's weaknesses must be understood in context, and its strengths highlighted.

[92] Barbanell, above n83, 67.
[93] William Lucy & Catherine Mitchell, 'Replacing Private Property: The Case for Stewardship' (1996) 55(3) *Cambridge Law J.* 566, 579.
[94] Ibid, 579-582.
[95] Ibid, 581.
[96] Ibid.

5. The strengths of common property

5.1 Sociability

The sociability of common property is the measure by which it contributes to community and social cohesion. Sociability is an underrated attribute of property,[97] which is, after all, a social institution.[98] An inherent strength of common property is its ability to 'counteract the individualised and exclusive notion of property … by regarding property as that which potentially brings a community together rather than that which separates it into exclusive units.'[99]

Jeanette Neeson saw 18th century English common property as more than a platform for natural resources, it was literally 'common ground', a place where commoners could interact, and develop concepts of identity and relation to place. In the early 1970s, idealistic rural communalists again looked to property to provide some social meaning for both self[100] and the collective.[101] Today the phenomenon of the community food garden speaks to similar desires. Sociability is a strength shared with public property, although arguably common property may be a more effective agent for sociability because the 'group' to which it relates is smaller and more identifiable.

The impact of the enclosure period in diminishing the link between property and sociability cannot be underestimated. Nicole Graham calls it a time of 'immense geosocial significance … [that] sheds light on the ongoing necessity

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[97] Carol Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property", (1986) 53 *U. Chi. L. Rev.* 711.
[98] Joseph Singer, *Entitlement: The Paradoxes of Property* (2000); Joseph Singer, *The Edges of the Field Lessons on the Obligations of Ownership* (2000).
[99] Davies, above n83, 127.
[100] The plethora of rural communes that appeared in the early 1970s provided the venue for a generational journey in personal spiritual discovery. Peter Cock personalized this when he wrote in 1979, 'My basic concerns were…similar to those of people within the alternatives movement. I was asking: Who am I? What am I going to become? How will I live? What do I need and want...I was dissatisfied, feeling the fruitlessness of protest and seeking something more meaningful than being a graduate in money-making.' Peter Cock, *Alternative Australia* (1979) 2
[101] Margaret Munro-Clark, *Communes in Rural Australia: The movement since 1970* (1986) 33.

and cost of the separation of people and place in dominant forms of contemporary property law.' [102]Andrew Buck describes it as a period of

> [a] hardening and concretion of the notion of property in land, and the rectification of usages into properties which could be rented, sold, or willed…. The process of dispossession did not involve legal decisions alone, but also changes in assumptions, which were themselves reflected in language and rhetoric. What was involved…was the creation of a mindset conducive to the acceptance and operation of market-oriented concepts of property.[103]

This 'hardening' squeezed aside alternative conceptions of property that did not have realisable value in money or commodity terms. Pushed to the periphery, or indeed off the edge, were more settled[104] values of property, sociable values that connected people to place. Yet the post-enclosure paradigm shift was not completely extinctive of such settled values. Academic Leigh Davidson describes his 'home' interest in communal land in northern New South Wales in the early 21st century as 'liberating'.

> We can only sell it to someone who has been accepted by the community as a member. In other words, we probably can't liquefy our assets and move on with any appreciable amount of capital. This arrangement has many advantages. For example we don't waste time wondering if we would be better off living somewhere else, so we have a commitment to place and community.[105]

Re-connecting property with 'place and community' is a latent attribute of common property. It is a value worthy of wider infusion into mainstream property discourse.

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[102] Graham, above n68, 83.
[103] Andrew Buck, *The Making of Australian Property Law* (2006) 24-25.
[104] Freyfogle sees the two competing values of property as 'settled' versus 'intensive'.
[105] Bill Metcalf, *Co-operative Lifestyles in Australia: From Utopian Dreaming to Communal Reality* (1995), 52. *The Northern Star* describes ownership at Dharmananda in the following terms; 'If a person leaves they are not paid for their buildings or their share in the trust…The community feels that because members cannot sell their shares, there is an incentive to make the community work.' Kevin Corcoran, 'The Search for a Better Way', *The Northern Star* (Lismore), 24 August 1988.

5.2 Use rights

Common property rights are exclusively rights to use. They are proprietary interests in the nature of non-private profits a prendre. By contrast, private property rights are on the whole possessory, with a smattering of second-tier usufructs. Public property rights lack developed definition, but may be generically characterised as rights of enjoyment. By a process of elimination, common property becomes the unassuming 'standard-bearer' for rights of use.

Use rights occupy an uncomfortable place in modern property, yet another consequence of the hegemony of private property. The right to exclude garners far greater attention and enforcement than the 'less compelling' or 'less protected' use right. This is despite A.M. Honore's listing of 'the right to use' as second in his list of eleven property incidents.[106] Use rights are uncertain property interests, dismissed pejoratively as 'personal', or automatically relegated on property hierarchies[107]. As Laura Underkuffler explains

> [t]he almost absolute protection for rights to exclude and devise must be contrasted with the "sliding scale" of protection afforded to other property rights. Other rights…are simply not held with the same sense of inviolable protection; their protection is far more a matter of collective whim. For example the right to use – in particular, the right to protect or to enhance value through continuation of pre-existing, permitted use – has been consistently characterized as "less protected" or "less compelling" than other property interests. The former has an attenuated sense of stringency of protection…the different ways in which the claimed rights were treated…can be explained only by the differing degrees of stringency with which these rights are, as an initial matter, protected.[108]

[106] Anthony Honore, 'Ownership' in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* (1961) 107,113.
[107] Native title rights are perceived as 'weak' because of their communal nature, Godden, above n83, 249-272.
[108] Laura Underkuffler, *The Idea of Property: Its Meaning and Power* (2003) 25.

Their low profile in property law mirrors the standing of common property. Yet use rights have much utility and potential significance. The 'tailoring of use rights' to land resources is the *modus operandi* of U.S. natural resources law,[109] a mindset that has much to offer property law. Conceptually, the usufruct enlivens multiple, simultaneous rights and ownerships of property across human landscapes. Conversely dominion entrenches a sterile monopoly. Freyfogle uses everyday examples to reinforce this argument

> Once we begin to focus on specific use-rights, we may begin to question many existing property arrangements: Should I not be able to paddle down your stream if I leave your activities undisturbed? Can I seek petition signatures in your shopping center if I do not disrupt your patrons?[110]

The straightforward example of the non-possessory right of way easement illustrates how use rights enable multiplicity of property use. The grant of a right of way easement does not exhaust other co-existing uses of the easement site; the burdened landowner can continue to use their land provided access is not impaired. Nor is the easement itself absolute; it is subject to restrictions and constraints. Consider however if access was protected by common law lease, where exclusive possession is integral. The lease leaves little scope, theoretical or practical, for other complementary rights to subsist.[111] On common land, the simple easement example is exponentially diversified. There multiple uses may occur contemporaneously, exercised by different owners under different rights. If the image of the easement is an intermittent link joining burdened and benefited landowners, common property is an inter-connected and complex 'web of interests', an allegory of Tony Arnold's reconstituted image of property.[112]

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[109] Eric Freyfogle, *Natural Resources Law Private Good and Collective Governance* (2007) 607-616.
[110] Eric Freyfogle, 'Context and Accommodation in Modern Property Law', (1988-1989) 41 *Stanford L. Rev.* 1529, 1551.
[111] But for the freeholder's right of reversion.
[112] Craig Anthony Arnold, 'The Reconstitution of Property as a Web of Interests' (2002) 26 *Harv. Envtl. L.Rev*. 281.

Raw exclusory power suffocates property diversity by devouring the theoretical 'oxygen' that enable other rights, including use rights, to co-exist. That is why common property, and its emphasis on use not dominion, is important. Use rights place property rights in context, as mere 'sticks' in a greater whole. Use rights are 'context dependent rather than abstract.'[113] They also invite the logical corollary that because a simultaneous plurality of uses is possible, ideally use rights should be compatible and sustainable rather than' resource-intensive [with] short-term orientation.'[114] Importantly use rights de-couple property and possession, without necessarily derogating from the need for security critical to property rights.

The right to use and enjoy is also a pathway for concepts such as land stewardship. Eric Freyfogle predicts a heightened place for use rights in his 'Bill of Rights for the Responsible Landowner'.

> Perhaps we should embrace a notion that landowners are stewards, with clear rights to use but only limited rights to degrade and consume. Perhaps we need to apply more broadly the idea that all of nature remains in a sense in public hands, with private owners receiving only prescribed rights to use.[115]

Freyfogle's right to use has as its jural correlative[116] a duty not to degrade, to act as steward. 'Property use entitlements will be phrased in terms of responsibilities and accommodations rather than rights and autonomy. A property entitlement will acquire its bounds from the particular context of its use, and the entitlement holder will face the obligation to accommodate the interests of those affected by his … use.'[117] Pioneering conservationist Aldo Leopold famously articulated 'stewardship' in terms of his much quoted 'land ethic', a responsibility that was the concomitant of the right to use.

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[113] Freyfogle, above n110, 1545.
[114] Klaus Bosselman, *The Principle of Sustainability* (2008) 15.
[115] Freyfogle, above n42, 141, 131-156; Joseph Sax likewise incorporates use rights in his concept of 'qualified private ownership', Joseph Sax, 'Takings, Private Property and Public Rights' (1971-1972) 81 *Yale L.J.* 149 154.
[116] However Wesley Hohfield would consider the right to use a *privilege* if it was to invoke a commensurate *duty*. Wesley N. Hohfield, 'Some Fundamental Legal Conceptions as Applied to Legal Reasoning', (1913) 23 *Yale LJ* 16.
[117] Freyfogle, above n110, 1531.

> We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect….[t]hat land is a community is the basic concept of ecology, but that land is to be loved and respected is an extension of ethics.[118]

Use rights may enable property duties by removing the all-consuming spatial inherency of possessory rights to fill the available void. This tendency is evidenced with private rights, freehold or leasehold,[119] and their conflation of exclusive possession. If the extremes of 'despotic dominion' are less polarizing, and use rights achieve credible parity with possession, duties, including environmental obligations of stewardship, may begin to populate the space vacated by private property's conflated right to exclude.

Christopher Rodgers argues that environmental stewardship is enhanced when a use-premised conceptualization of property replaces one dominated by an ownership discourse. Rodgers describes a 'resource allocation model of property rights' comprising 'elements or strands of **utility** (emphasis added) that combine to make up the constituent elements of a land interest'[120] Use rights transform the landowner from an entity with absolute control, to the holder of a 'residuum of socially permitted power over land resources… a state-approved usufruct.'[121] 'The role of property rights in this context is to allocate access to a disputed resource, and to define the terms on which access to that resource will be permitted by the law.'[122] Rodgers places primacy on use, not possession, and the consequent dividend is greater environmental stewardship of land.

Another view is that property is already pervaded by responsibilities, that there is no need to 'construct' a corresponding obligation or duty from a pre-

[118] Aldo Leopold, *A Sand County Almanac with other Essays on Conservation from Round River* (1966).
[119] John Page & Ann Brower, 'Property Law in the South Island High Country – Statutory not Common Law Leases', (2007) 15 *Waikato L. Rev.* 48
[120] Christopher Rodgers, 'Nature's Place? Property Rights, Property Rules and Environmental Stewardship', (2009) 68(3) *Cambridge Law Journal* 550, 557.
[121] Ibid.
[122] Ibid, 551.

existing right or privilege.[123] Murray Raff argues that environmental (and social) obligations are 'implicit in the owner's right to make beneficial use and enjoyment of the object of ownership,'[124] they are not some 'external constraint.'[125] Raff describes the belief that property owners have rights to use and enjoy so 'extreme' that they may embrace the destruction of the property, regardless of its environmental value, as a dogma, a 'self-evident truth without the extensive reference to authoritative sources which one might expect to such a dramatic conclusion.'[126]

The centrality of use rights presents an opportunity for common property, as both a 'role model' for new conceptualizations of property, and possible enabler of property obligations. And if Freyfogle's prediction for use rights comes to pass, common property may be an unintended beneficiary of their resurgence.

5.3 Environmental values of proportionality and moderation of use

The norms and values of common property are important in the implications they pose for property's future direction, and its 'quest for an environmental ethic.'[127] They have a distinctly environmental resonance. As Carol Rose articulates, '[t]here are great bodies of law about common property, and they revolve around an ethic of moderation, proportionality, prudence and responsibility to the others who are entitled to share in the common resource.'[128]

Rose argues that such values should influence property rhetoric, such that our rights and relationships with land are seen through the prism of a 'gift' rather

[123] Joseph Singer, *The Edges of the Field Lessons on the Obligations of Ownership* (2000) 16-17.
[124] Murray Raff, 'Environmental Obligations and the Western *Liberal* Property Concept', (1998) 22 *Melb. Uni. L. Rev.* 657, 691.
[125] Ibid, 672.
[126] Ibid, 662.
[127] Carol Rose, "Given-ness and Gift: Property and the Quest for Environmental Ethics" (1994) 24 *Envtl. L.* 1, 14-31.
[128] Ibid, 25.

than a 'given'.[129] Sustainability is a natural consequence of these values of restraint, not the inexorable 'tragedy' pre-destined to befall common property.

Such qualities of common property are not a recent invention. In 18th century England, common property did not fail for 'tragic' reasons of unsustainable or irresponsible use. As Nicole Graham observes

> The death of the laws and customs of the commoners and the peasant economy was not brought about by any intrinsic failure or inevitable collapse. Contrary to the claims of the improvers (those who stood to benefit from enclosure), the laws and customs of the commoners were neither unproductive nor non-viable.[130]

Klaus Bosselmann likewise cites a rich tradition of sustainable land use in Europe dating from the end of the 14th century to the beginnings of the 19th century, when common property systems (known in German as 'Allemende') institutionalised principles of sustainable land use. Informing Allemende practices were ethics of land use where 'land was respected as an essential ingredient of life with humans being mere users', and where land could only be 'owned within the limit of ecological sustainability.'[131] Bosselman describes this human-nature relationship as one of stewardship, arising from restrictions on land use imposed by an overarching structure of common property rights. Common property imposed restrictions of both a practical and ethical nature, the latter comprising 'an important ecological limitation … the relational context of land use rights… regarded as heritage from the past and obligation for the future.'[132]

The strengths of common property are intangible and ill defined. Belonging to place, or 'group-hood' values are 'warm and fuzzy' concepts. It is far easier to 'see' common property's weaknesses.

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[129] Ibid.
[130] Graham, above n68, 54.
[131] Bosselman, above n114, 14.
[132] Ibid.

6. The weaknesses of common property: profile and reputation

The flaws of common property are its obscurity and tarnished reputation. In the latter case, this is understandable given the normative force of Hardin's tragedy thesis. But the former is perplexing. We have lost the skill to 'see' common property. Legal historian John McLaren attributes this in the first instance to 'selective historical amnesia', a 'forgetfulness of customary rights in common to land which settlers or their recent ancestors had enjoyed under English or Scots law.[133] This forgetfulness, conscious or otherwise, has transformed into a societal or corporate loss of knowledge as generations pass. McLaren's explanation is relatively simple; we cannot 'see' common property if we no longer know what common property is, or what it represents.

Carol Rose identifies more modern factors for the obliviousness of limited common property, and its problematic place in western legal traditions. Such obliviousness is 'odd', Rose argues, because 'common property itself is actually ubiquitous, if unremarked.'[134] Rose cites a combination of economic and cultural reasons for this myopia. Economically, common property is perceived to be inefficient, its rules are internally complex and unwieldy when compared to individual private property. This unwieldiness is particularly exacerbated in the case of alienability.[135] Also, 'claims of entitlement [to limited common property] may be more difficult to recognize, monitor, transfer, and enforce.'[136] Membership of the entitled group is often amorphous, who belongs and who does not, is not always readily defined, and common property's responsive, dynamic nature to resource availability means that resource rules fluctuate over time and according to exigency. The economic stability or assuredness demanded of property takes a slightly different, less comfortable form for common property.

[133] McLaren, above n36, 135.
[134] Rose, above n2, 132.
[135] This property characteristic is overstated; many forms of property have restrictions on alienability, for example freehold life estates.
[136] Rose, 140

Culturally, Rose submits that communal property claims are often made by groups 'somehow deemed inappropriate to make claims of entitlement.'[137] These claims by groups with 'questionable' social status offend social notions of the *propriety* of property-ownership. Joseph Singer claims that our sense of propriety plays a significant role in resolving ownership disputes and 'public concepts of entitlement.'[138] For Kevin and Susan Gray, 'a deep subtext of propriety has always pervaded the social and legal definition of "property."'[139] Margaret Davies explores the resonance of property's propriety, the idea that 'property is there to reflect and cement propriety – the proper order of the social and political spheres.'[140] The social status of the property claimant is often problematic for common property, whether they are landless commoners, indigenous peoples[141], or 'long-haired hippies' in 1970s rural intentional communities.[142] The combination of unconventional communal claim and dubious social status 'overlap and conspire against [common] property recognition.'[143]

Rose (later and separately) added a third reason for common property's problematic profile, at least in the American common law. Politically, informal customary governance fell out of favour with American courts in the mid 19th century. Community practices that gave rise to customary forms of collective property were 'mired in the swamps of medieval feudalism, hierarchy, and rigidity.'[144] Such ideas were unpalatable because they were 'incompatible with democratic forms of government'.[145] Laws (including property laws) should be made by forward thinking, democratically elected representatives; not communities looking backwards to history. Common property was no longer in vogue with progressive democratic ideals of law making.

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[137] Ibid, 141
[138] Joseph Singer, *Entitlement: The Paradoxes of Property* (2000) 190
[139] Kevin Gray & Susan Gray, 'Private Property and Public Propriety' in *Property and the Constitution* (Janet McLean ed.) (1999) 13
[140] Davies, above n83, 12.
[141] Rose claims that American law was hostile to common property as a 'historically self-serving myopia' that ignored the collective property claims of Native Americans. Rose, above n57.
[142] John Page, 'Common Property and the Age of Aquarius', (2010) 19(2) *Griffith Law Review* 172
[143] Rose, 141
[144] Rose, above n57.
[145] Ibid.

Lastly, as previously traversed, the reputation of common property has been tainted by the stigma of Garrett Hardin's 'tragedy of the commons'.[146] This essay has become a 'bellwether in the debate on community versus individual rights…'[147] But it is worth repeating that Hardin was not talking of internally regulated common property when he advanced his tragedy thesis, but rather 'open access' property, the unregulated commons.[148] Tragedy's counter-argument is that properly regulated common property may be its antithesis,[149]a potential 'comedy of the commons.'[150] Yet this counter-argument faces an uphill task in overcoming the pervasive, crowding-out 'white noise' of the commons tragedy.

7. Conclusion

Common property is a multi-faceted paradox. It is simultaneously 'there' and 'not there' in terms of presence and visibility. It is both anachronistic and a mooted model for future natural resource management. It is stuck in its historical milieu, yet the 'idea' of common property can take root in unlikely modern contexts. It is tragic or comedic. On the 'inside' it is communal and inclusive, but on the 'outside' it is private and exclusive. It was removed from property consciousness by enclosure, but its rights are incapable of being physically enclosed. It is vulnerable yet persistently resilient.

This chapter has canvassed the traditional and less traditional forms of common property. From rights of pasturage, to 21st century urban forms, and natural resource theory, the diversity and insight of common property is rich but underestimated. Despite (or because of) its manifest internal contradictions, common property adds vital layers of diversity and complexity to the expansive notion of property plurality. It is a small but important piece

[146] Hardin, above n63.
[147] Preface to David Grinlinton and Prue Taylor (eds.) *Property Rights and Sustainability; The Evolution of Property Rights to Meet Ecological Challenges* (2011).
[148] An example is the American rangeland prior to the enactment of the *Taylor Grazing Act* of 1934. See also Fuchs, above n85, 59-60; Freyfogle, above n45, 177; Davies, above n83, 73.
[149] Ciriacy-Wantrup & Bishop, above n78; Bosselman, above n114, 13-15.
[150] Rose, above n97.

in the property mosaic because of the qualities it brings to property, its emphasis on use, community, and non-commodity values, and a propensity to infuse wider property discourse with its paradoxical originality. In sum, its influence outweighs its size. To lose sight of common property is to pauperise the property mosaic, and in turn diminish the potential of property to sustain human landscapes.

Chapter 4 Seeing the diverse property mosaic

1. Introduction: The imaginings of property

From time-to-time, the transformative potential of property law has been glimpsed, serendipitous-like imaginings of the many and different 'futures of property'.[1] In 1964, Charles Reich saw property as the vanguard of an emerging civic compact, a New Property 'right' to 'government largess' that would address social inequity.[2] In the early 1970s, Christopher Stone was inspired by the constantly evolving nature of property to imagine that trees had legal standing,[3] while Joseph Sax envisaged an environmental future where public property rights were equal to their private equivalents.[4] In the 21st century, Jedediah Purdy argues for a new approach to property to address the existential threat of climate change.[5] When confronted with insurmountable challenge, scholars aspire to property, and invoke in it an imagination of seemingly limitless potential.

How property in land is *imagined* is the thrust of this chapter. Premised on Carol Rose's ideas of 'seeing' property,[6] and the impetus that unorthodoxies such as property marginality[7] give to the imaginings of new paradigms, this chapter describes the 'property mosaic' as a means to a wider 'seeing' of property patterns in human landscapes. It also lays the foundations for subsequent chapters, the potent implications of property diversity for land obligation (chapter 5) and community (chapter 6). To 'see' property diversity is to imagine what Joseph Sax calls 'a different attitude towards land and the nature of land ownership itself',[8] a reconceptualization that reflects the

[1] Carol Rose, "The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems", (1998-1999) 83 *Minn. L. Rev*. 129.
[2] Charles Reich, 'The New Property' (1964) 73 *Yale LJ* 733.
[3] Christopher Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' (1972) *S. Cal. L. Rev.* 450.
[4] Joseph Sax, *Defending the Environment A Strategy for Citizen Action* (1971) 174.
[5] Jedediah Purdy, *The Meaning of Property: Freedom, Community, and the Legal Imagination* (2010).
[6] Carol Rose, 'Seeing Property' in *Property and Persuasion Essays on the History, Theory and Rhetoric of Ownership* (1994) 274.
[7] A J van der Walt, 'Marginality and Property' in Gregory Alexander & Eduardo Penalver (eds.) *Property and Community*, (2010).
[8] Joseph Sax, 'Property Rights and the Economy of Nature Understanding *Lucas v. South Carolina Coastal Council* the Economy of Nature' (1992) 45 *Stanford Law Rev.* 1445.

heterogeneity of people's proprietorial relationships with land, one that escapes the narrow constraints of a prevailing monistic paradigm.

Part 2 commences by articulating the guiding principles of a doctrine of property diversity in land. Part 3 then compartmentalizes the constitutive elements of the 'mosaic', incorporating aspects of preceding chapters devoted to public, private and common property. Part 4 seeks to migrate the 'property mosaic' from untested theory to grounded practice, looking for its telltale signs in sustainable communities literature. Part 5 builds on the observations of part 4, by a process of descriptively 'mapping' the 'property mosaic' in three case studies. Part 6 concludes by taking Carol Rose's 'seeing' of property literally, pictorial manifestations of diverse property patterns and narratives, observed and explained in context.

2. Guiding principles of a doctrine of property diversity in land

It is trite to observe that without diversity, there can be no mosaic. This part 2 outlines the core tenets that give structure and content to a nascent doctrine of property diversity in land. Many of these foundational principles are further developed in chapters 5 and 6.

Property diversity *sees* the fullest range of property patterns in human landscapes, dense mosaics of private, public and common estates, and hybrid variants in between, that collectively explain the propertied truth of 'who gets to do what and where.'[9] It also *sees* property patterns holistically, their connections and interactions. Diverse property is likewise contextual, grounded in actual place, not de-objectified abstraction. It favours use rights over possession, and situates exclusion alongside inclusion. It celebrates that property is multivalent, a paradigm where no single value is universal. Lastly, it confronts the challenge (and opportunity) of eclecticism, embracing the idea that property is particularized, variable, and on occasions untidy.

[9] Eric Freyfogle, *Agrarianism and the Good Society: Land Culture Conflict and Hope* (2007) 107.

2.1. Diverse property in land is visible

Carol Rose argues that '"seeing" property is … an act of imagination [that] opens the door to … persuasion.'[10] By contrast, an inability to see property is a 'kind of imaginative disability.'[11] Rose's *seeing* of property in land arises through four media - as pictures, metaphors, narratives and illusion. The first three have especial resonance for property diversity. By accentuating difference, diverse property shifts the 'seeing' of property in landscapes from near-invisible abstraction to contexted relief.

To see diverse property as pictures is to recognize its many visual markers or physical indicia. For private property it may be the fences, locked gates, or keep out signs that 'yell'[12] of exclusion. For public property it may be well trodden grassed paths, crowded beach foreshores, or the 'close the gate' signs that speak of inclusion. Pictures likewise inform us of land boundaries, survey pegs that artificially demarcate newly subdivided lots, or wet sands that 'naturally' divide public and private on American beaches. Yet pictures may likewise show blurred overlaps, where public and private converge in ambiguity.[13] Pictures also include maps that while abstract, enable complex visualities to be reduced to simple, easily understood representations. Maps also 'yield unexpected new information' about property by 'bringing data together in a single perceptible space'[14], revealing otherwise concealed connections. 'The map, far from stifling the imagination, invites the viewer to reflect on the story behind the case.'

To reflect on 'stories behind the case' is to segue into the seeing of property as *narrative*, stories set in tangible, propertied settings. By example, Rose writes of 'the battered remnants of last century's fences, meandering…though the blissfully resurgent woods' of America's New England, a 'vision [that]

[10] Rose, above n6. Persuasion then leads to action, 'the ways that humans think they can and should interact with their environment.' Ibid, 296.
[11] This 'disability' inter alia stops people from 'envisioning risks to land, or ways to deal with risks sensibly.' Ibid, 285.
[12] Carol Rose, 'Possession as the Origin of Property' (1985) 52 *U Chi. LR* 73.
[13] For example, the bach photo in part 6.
[14] Rose above n6, 277

reveals the impermanence and pathos of (private) property's aspirations to eternity.'[15] Property's narratives 'enlist the visual imagination to tell a story about property generally. They aim at making the audience understand property relationships… by watching in the mind's eye the changes that occur in the shape and configuration of ownership and control.'[16] Classic stories of property are those of tragedy, improvement, or scarcity,[17] sweeping morality tales that entrench private dominance and drown out alternative narratives. More mundane, but equally significant stories are those of everyday commerce or sociability, acted out on private or public lands. Narratives are also important in anchoring people to place, the 'folklore' that orients residents through a sense of continuity from past to present.[18]

To see property as metaphor is more nuanced and less obvious. Yet Rose argues that apartment owners typically see property in terms of metaphor, a larger bundle for their private strata unit and an altogether different and reduced one for common or shared areas. To see property as metaphor is to accentuate property's duality, at one level the divisibility of its sticks, and at the other, to 'reclaim a sense of the whole and the relatedness of the various elements of entitlement.'[19]

To see property in land is more likely where there is contrast, where there is a visible 'warp and woof'[20] in the property patterns of human landscapes. Seeing patchworks of private, public and common property, or the variegated stories they tell, accentuates difference. Conversely, 'seeing' is less likely when camouflaged in a property monotone. Carol Rose saw property in the 'forceful and imperious landscape' of Hawaii, islands of striking physicality where 'people who live there seem to take an unusual interest in property law,

[15] Ibid, 286-7
[16] Ibid, 289
[17] Harold Demsetz's tale of the fur skin trade amongst Indian communities ended with the rise of private property when the resource became scarce through over-hunting.
[18] Property secures historic streetscapes through restrictive covenants, the preservation of public squares or parklands.
[19] Rose, above n6, 282
[20] Leopold describes a 'pepper-and-salt pattern in the warp and woof of the land-use fabric', Aldo Leopold, *For the Health of the Land: Previously Unpublished Essays and Other Writings* (J. Baird Callicott & Eric Freyfogle (eds.) 1999), 168.

and … know a great deal about it.'[21] In such places, seeing property is intuitive, it 'hits you in the eye.'

> The landscape has directed Hawaii's property law to an intense concern for issues of land and water; but the intervention of property law, in its various guises, has in turn affected the landscape. Those effects are visible too: the waterworks, the patterns of cultivated and natural vegetation, the tall buildings in Oahu and the low ones in Kauai, these matters are creatures of law, among other things, and most particularly the law of property.[22]

It is no accident therefore that the case studies in part 5 are mostly found in landscapes of striking physicality. It is much easier to see and explain property diversity where it 'hits you in the eye'. But once recognized, its patterns manifest in more everyday places.

2.2 Diverse property sees land as an inter-connected whole

Once seen, property diversity then shifts the imaginative focus from the artificially imposed lines that divide land parcels, to the holistic landscape in between and across the lines. It refutes the paradigm that looks 'to the lines first, not the land upon which the lines were laid,'[23] and affirms Paul Carter's intuition that 'I have begun to see the straight edges of our constructed environment as narrow pencils of shadow, as dark mortar joining the parts of the world together.'[24]

Joseph Sax's prescient 'economy of nature' observes that 'viewing land through the lens of nature's economy reduces the significance of property lines.'[25] Its consequence is 'an emerging view of land as part of an ecosystem.' [26] The 'backwards looking' alternative[27] is one where land is inert,

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[21] Rose above n6, 267
[22] Rose, above n6, 267-8.
[23] Curt Meine, *Correction Lines Essays on Land, Leopold and Conservation* (2004) 201.
[24] Paul Carter, *Dark Writing Geography, Performance, Design* (2009) 1.
[25] Sax, above n8, 1445.
[26] Ibid, 1438.
[27] Sax argues the majority judgment in Lucas affirmed a conception of land where owners bear no collective responsibility for the provision of natural services that land naturally

and owners share no obligation to participate in the natural (or ecological) services that their lands collectively provide. 'Emphasizing the systemic (what Sax calls 'ecosystemic') reflects that 'connections dominate.'[28]

Connections between, and within, private, public and common land holdings have greater capacity to avoid Eric Freyfogle's 'tragedy of fragmentation', the private stasis that paralyzes human landscapes. The inter-connective mosaic is an overarching mechanism that measures the impact of land use externalities, a subject further advanced in chapter 5. Its metaphor is akin to Tony Arnold's complex 'webs of interests',[29] or Henry Smith's 'architectural' or 'modular' conception of property,[30] except that it inserts the full panoply of property tiles into the 'seeing'. Its antithesis is the disaggregated bundle of rights, where universalized stick rights readily detach, and 'in principle relate to anything else.'[31] As Smith wryly notes, 'the bundle-of-rights picture of property treats property in an atom-counting fashion, which is fine as far as it goes. But what we still need is a theory of how the pieces fit together.'[32] Property diversity starts to provide such a picture.

2.3 Diverse property rights are use rights

Sax's 'economy of nature' also re-conceives ownership rights in land as use rights, not rights to possess, or rights of dominion. His 'usufructuary model'[33] draws analogies with water. 'Use rights prevailed in water law because of interconnections and community dependence on a resource's natural functions – such attributes [that would] characterize land in an ecological

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provides in an ecosystem. In Lucas, the plaintiff's land was located in a coastal environment zone that only permitted very limited uses, excluding residential development. The landowner successfully obtained compensation for this 'taking.' The court did not accept that the land provided important natural services such as wetlands, an erosion buffer zone, or wildlife habitat.

[28] Sax, above n8, 1445.

[29] Craig Anthony Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26 *Harv. Envtl. LR* 281.

[30] Henry Smith, 'Property as the Law of Things' (2012) 125 *Harvard Law Rev.* 1691

[31] Smith, above n30, 1700.

[32] Ibid, 1709.

[33] In 1789, Thomas Jefferson declared 'that the earth belongs in usufruct to the living.' Gregory Alexander, *Commodity & Propriety Competing Visions of Property in American Thought 1776-1970* (1997) 26-27.

perspective.'[34] Their ecological credentials rest on their regulation of resources as 'continuous and inter-connected' and the caveat that the private right to extract is subservient to the community's dependence on the resource. Use rights thus 'serve two masters, the community and the individual.'[35]

Carol Rose and Eric Freyfogle likewise see the parallels between water and emergent use rights in land. Rose invites readers to imagine a paradigm where water is property in land's 'chief symbol.'

> We might think of property rights…in quite a different way. We might think of rights… as more fluid and less fenced-in; we might think of property as entailing less of the Blackstonian power of exclusion and more of the qualities of flexibility, reasonableness… moderation, [and] attentiveness to others.[36]

Freyfogle predicts that were property law to develop like water law, property rights would 'increasingly exist as a collection of use rights, rights defined in specific contexts, and in terms of similar rights held by other people.'[37] Context and accommodation - between the right-holder, other right-holders, and the environment- figure prominently in Freyfogle's ongoing advocacy of use rights.[38]

Use rights escape from theory to practice in US natural resources and public lands law. This vast jurisprudence of property in natural resources[39] offers an instructive counter-point to traditional Anglo-common law approaches to real

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[34] Sax, above n8, 1452-3.
[35] Ibid, 1453.
[36] Carol Rose, 'Property as the Keystone Right?' (1996) 71 *Notre Dame L. Rev*. 329, 351
[37] Eric Freyfogle, 'Context and Accommodation in Modern Property Law' (1989) 41 *Stanford Law Rev.* 1529.
[38] Freyfogle has advocated use rights widely, 'prescribed private rights to use while nature remains in public hands' in Eric Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (2007) 141.
[39] Anthony Scott 'Development of Property in the Fishery' (1988) 5 *Marine Resource Economics* 289; Anthony Scott, *The Evolution of Resource Property Rights* (2008). Scott observes that 'the emergence of property rights to natural resources is *overlooked*.'; Barry Barton, 'Property Rights Created under Statute in Common Law Legal Systems' in A. McHarg et al (eds.) *Property and the Law in Energy and Natural Resources* (2009) 80; Leigh Raymond, *Private Rights in Public Resources* (2003).

property. Natural resources (whether of an extractive[40] or non-extractive[41] nature) are capable of capture, monetization, or transfer. Yet property in natural resources is overwhelmingly couched in the terminology of permits, licences, concessions, or privileges, rights predicated on use not possession. Importantly, use rights permit the sharing of resources, since uses are not automatically mutually exclusive. Thus, on the American rangelands, private rights to graze share the public domain with public rights of recreational access.[42] American natural resources law, like water law, has avoided the yoke of possession, and fostered instead long-standing policies of 'multiple use sustained yield'.[43]

Use rights are desirable for a number of reasons. They enable (and reflect the reality of) multiple rights co-existing in the one parcel of land. They are consistent with the common law's view of property rights as relative not absolute. And the grant of a private use right does not exhaust or consume residual public rights in land. Even where *exclusive,* use rights focus on the proper question of exclusivity of access to the resource, not the falsely conflated right to exclude.[44] And as Sax identifies, use rights are more attuned to an ecological perspective, concentrating on the tangible resource, how it relates to other inter-connected resources, and ultimately, each resource's finitude.

While the common law does not eschew the usufruct completely, its incorporeal hereditaments are hierarchically inferior, frequently 'burdens' on possessory estates rather than templates for the future imaginings of property in land. By contrast, diverse property rights reverse this logic, since public and

[40] Mining, forestry, and grazing (the mineral, timber, and range resource) were staples of the western economy, Scott Lehmann, *Privatizing Public Lands*, (1995); Samuel Trask Dana & Sally Fairfax, *Forest and Range Policy Its Development in the United States* (2nd ed, 1980)
[41] Wildlife, recreation and preservation are treated as natural resources, George C. Cameron et al (eds.) *Federal Public Land and Resources Law* (6th ed., 2007).
[42] John Page, 'Grazing Rights and Public Lands in New Zealand and the western United States: A Comparative Perspective' (2009) *Natural Resources Journal* 403.
[43] Dana & Fairfax, above n40.
[44] What is *exclusive* in the context of use rights is the right to enforce a monopoly over a particular use. It may be a corollary of that exclusivity that the use right can only be exercised where another's rights to be included are denied. Equally, it may be a corollary of that exclusive right that other compatible uses can feasibly co-exist; Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) *Univ. of Toronto Law Journal* 275, 277.

common rights to land are use rights. Rather than being seen as quaint exceptions to possessory estates, private use rights are seen in pluralistic context.

2.4 Diverse property in land is contextual

John Orth's identification of the unifying themes of the American common law of property reveals in its opening paragraphs a profound truism. Orth writes '[a]ll property law is local, … the place where the land lies.' His efforts to reach generic conclusions only make sense, he argues, when applied to 'some specific time and place.'[45]

Orth's plain observation runs counter to the prevailing orthodoxy that property rights are universalized relations between persons about things. In the world of property law, place is irrelevant. Having reached its abstract apogee with Wesley Hohfield's analysis of relations between jural persons,[46] abstraction's end game is famously that of illusion.[47] According to Nicole Graham, the *paradigm of placelessness* means 'that property is not about things, that property is not really "real", [and] that property is de-physicalised.'[48] Nick Blomley observes that modern property has been emptied of all its heterogeneity and distinctiveness.[49] Yet such critiques, descriptions of the totalizing and universalizing tendencies of post-enclosure property, jar with Orth's simple logic.

Theodore Steinberg takes property's detachment from place to absurd lengths when writing of the 'folly of owning nature.'[50] Steinberg cites private appropriations of the surface of the Moon, or property disputes over the weather, as comedic attempts to own that which is beyond capture. 'It is a

[45] John Orth, *Reappraisals in the Law of Property* (2010) viii.
[46] Wesley Hohfield 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) *Yale LJ* 16; Wesley Hohfield 'Fundamental Legal Conceptions as Applied in Legal Reasoning' (1917) 26 *Yale LJ* 710.
[47] Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge LJ* 252.
[48] Nicole Graham, *Lawscape Property Environment Law* (2011) 7.
[49] Nicholas Blomley, *Unsettling the City* (2004).
[50] Theodore Steinberg, *Slide Mountain, or The Folly of Owning Nature* (1995).

tribute to the colonizing impulse at the heart of property law that it has been able to encroach' into these surreal realms. Steinberg warns that a world where everything can be converted into property may be a creative one, but it is also 'an impoverished, … dangerous world as well'.[51]

The destructiveness and perverseness that Steinberg identifies is however a consequence of the over-reach of *private* appropriation. And as Graham and Blomley agree, property was not always so place-less. Graham observes that pre-enclosure common property was diverse, localized and heterogeneous, while Blomley sees resistance to enclosure an ongoing sub-text of modern property. Such 'resistance' can be seen in the localized collective claims to property that Blomley documents in his home city of Vancouver, evidence that (at least some) property is still local.

Diverse property reaches back to the rights of pre-enclosure commoners as much as it incorporates the dissentient voices of Blomley's poor and unpropertied. And it agrees with John Orth's intuitive assertion that property is local, contexted to the place where the land lies.

2.5 Neither exclusion nor inclusion is paramount

Property diversity also recognises that exclusion cannot be understood in isolation. Chapter 1 observes that the right to exclude has always been qualified by exigency[52] and that 'too much exclusion' leads to unbalanced perversities. Chapter 2 argues that public property's *right of inclusion* is a critical foil to private property's exclusion. And chapter 3 examines the paradox of common property, exclusionary on the outside, but inclusive within. As each chapter demonstrates, exclusion *in itself* provides an incomplete, unsatisfactory account of property.

[51] Ibid, 165.
[52] *State v Stack* 277 A.2d 369 (N.J. 1971).

In stark contrast, the central logic of property uniformity is that property 'center[s] around the idea of exclusion.'[53] To Shyamkrishna Balganesh, classifying an interest as a property right universally 'entails endowing it with an exclusionary significance.'[54] Yet Balganesh himself is forced to create a 'plausible' category of *quasi-property* to explain those interests that fall outside his exclusion thesis.[55] For pluralists such as Hanoch Dagan, 'large slabs of property doctrine' would need to be discarded if exclusion was its sole premise.

> Numerous property rules, prescribing the rights and obligations of members of local communities, neighbors, co-owners, partners, and spouses cannot be fairly analyzed under the exclusion paradigm; the whole point of these elaborate doctrines, after all, is to provide structures for cooperative, rather than competitive, relationships. These doctrines are not marginal to the life of property. Rather, they deal with some of our most commonplace human interactions and thus tend to blend into our natural environment.[56]

Property diversity does not compel its proponents to take absolutist or implausible positions. Instead it recognizes that exclusion and inclusion are two-halves of the one dialectic, where property is shaped by the constant interaction (and at times overlap) of each irresistible force. Dagan's delicate 'balance of property values'[57] is one where the diversity of context, and the particularity of resource, determines the contours of property form, and its coalesced, commensurate proportions of inclusion and exclusion.

2.6 Diverse property in land is multivalent

Another central logic of property diversity is that it is more varied and multivalent than the private liberal paradigm supposes. This extends not only to the seeing of the public and common estates, and their respective property

[53] Shyamkrishna Balganesh, 'Property, Like, But Not Quite Property' (2012) 160 *U. Pa. L. Rev.* 1889, 1892. 'Central to the idea of property is exclusion.' 1899.
[54] Balganesh, 1899.
[55] Ibid, 1924-5.
[56] Hanoch Dagan, 'Property and the Public Domain' (2009) 18 *Yale Journal of Law and the Humanities* 84, 85-6.
[57] Hanoch Dagan, *Property Values and Institutions* (2011).

norms, but also to the seeing of private property's long ignored social and communitarian values. The latter is a key focus of the scholarship of Hanoch Dagan.

Dagan argues that monistic, totalizing theories of property are incomplete in their account of the 'lived experiences of property'.[58] Thus, Dagan rejects theories that celebrate 'property as independence' because, lacking any social obligation, such accounts ultimately entrench widespread human dependence for those that are property-less. Likewise he criticizes theories that promote 'property as interdependence' because their refusal to countenance voluntary exit creates illiberal communities that ironically dilute community values.[59] Instead he endorses a 'pluralistic account of property.'[60] Pluralism means that it is 'reasonable, even desirable, for the law [of property] to adopt more than one set of principles and more than one set of coherent doctrines.' [61] It reflects a truth of property law that recognizes 'different meanings of ownership in different social contexts and with respect to different resources.'[62] Once relieved of the burden of property monism, heterogeneity can be acknowledged for what it is: 'a testimony of property law's appreciation of the significance of facilitating multiple forms of human interaction.'[63] And because 'free people have diverse ends, diverse *forms of property* are necessary to realize those ends.'[64]

Diverse property enacts Dagan's theories. Different meanings of *ownerships* do arise according to context and the nature of the resource; even if the common law is sometime loathe putting a different name to it.[65] And it is reasonable, as Dagan argues, for property to have more than one set of

[58] Ibid, 57-75. 'Given that property law governs so many aspects of human action and interaction, the commitment to pluralism is … a major reason for property theory to resist unifying normative accounts of property law in its entirety.' Ibid, 72.
[59] Ibid, 63, 69.
[60] Ibid, 70, 71.
[61] Ibid, 71.
[62] Ibid, 72.
[63] Ibid.
[64] Dagan uses the fee simple and marital co-ownership as exemplars of contextually different institutions that endorse a 'free choice of multiplicity'. The former affirms an individual's 'safe haven'; the latter is a 'framework for interdependence and mutual responsibility.' Ibid, 73.
[65] For example, the freehold life tenant and the leasehold tenant, despite common nomenclature, are different ownerships.

principles, since the institution of property is not a monolith. The normative mosaic that is yielded up by the property mosaic is further canvassed in chapters 5 and 6.

2.7 Diverse property is eclectic

The flipside of diverse property is that it is untidy. If 'real not abstract', then by necessity it is customized to context. Such untidiness could be simply explained as proof of Dagan's proposition that ownerships vary according to context and resource. However, another interpretation is more problematic - that customized property is unpredictable and unstable, in short, unworthy of property status.

The latter interpretation aligns with the 'closed list' view of property mandated by the 'meta-principle'[66] of *numerus clausus*. This deeply implicit concept, it is alleged

> expresses the stringency of the common law's approach to property rights, particularly over land. In essence, the principle holds that landowners are not at liberty to customise land rights, in the sense of re-working them in an entirely novel way to suit their particular individual needs and circumstances. Rather, any new rights must fit within firmly established pigeonholes, of which the law permits only a small and finite number… In this respect, property law is highly prescriptive: the system of rights *in rem* is a strictly circumscribed one, with a tight regulatory regime governing the range and form of available rights over land.[67]

Numerus clausus prescribes that there are only so many estates, servitudes, and security interests[68] that the law will recognize as things of property. If the interest under scrutiny is outside that list, then 'it will be impotent against

[66] Thomas Merrill & Henry Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale Law Journal* 1.
[67] Brendan Edgeworth, 'The *Numerus Clausus* Principle in Contemporary Australian Property Law' (2006) 32 *Monash Uni. Law Rev*. 387, 387-8.
[68] Edgeworth, above n67, 389.

successors in title.'[69] Unlike the liberties of contract law, parties are not free to create new categories of enforceable property. Henry Smith and Thomas Merrill justify such restrictiveness on the drily economic argument that 'excessive information costs' are imposed on third parties where property interests are non-standard, such that any resultant interest is 'sub-optimal'.[70]

Yet the edifice of *numerus clausus* is not as imposing as it first appears. It is a creature of the civil law. Elsewhere, Henry Smith explains that *numerus clausus* must be seen in its historical milieu, a doctrine designed 'for the wholesale stripping of feudal custom out of [civilian French] property law.'[71] Prior to 2000, it was prominent by its absence in the common law.[72] As Smith and Merrill admit, the deeply implicit principle 'has no [common law] name.'[73] Indeed it is more a 'pigeon holing exercise',[74] a norm of judicial self-governance that assumes that the creation of new property rights is solely a legislative concern.[75] The norm thus operates to ensure that courts defer to the legislature, even if unaware of the reason why.[76]

Landmark property cases however, undermine this assumption.[77] Brendan Edgeworth cites *Tulk v Moxhay*[78] as 'brazenly shunning' *numerus clausus*. But even to accept that courts are reluctant or aberrational property lawmakers does not explain the converse freedom of legislatures to create

[69] Ibid.
[70] Merrill and Smith use a 'Monday watch' as an example of a highly idiosyncratic property right that imposes too high an information processing cost on subsequent owners as strangers to that title. Merrill & Smith, above n66, 26-7.
[71] Henry Smith, 'Community and Custom in Property Law', (2009) 10 *Theoretical Inquiries in Law* 5, 35.
[72] Merryman's comparative study of Italian and American land law attributes the absence of trusts or future estates in Italian law to *numerus clausus*, versus their widespread use in Anglo-American *common law* John Merryman, 'Policy, Autonomy, and the *Numerus Clausus* in Italian and American Property Law (1963) 12 Am. J. Comp. L 224.
[73] Merrill & Smith, above n66, 4.
[74] Ibid, 11.
[75] 'Merrill & Smith, above n66, 58.
[76] Ibid, 8.
[77] For example, *Mabo (no. 2) v Queensland* (1992) ALR 1 recognized native title within Australian common law.
[78] *Tulk* held that restrictive covenants were enforceable in equity as property rights, *Tulk v Moxhay* (1848) 41 ER 1143.

new property outside the closed list – a power unfettered by any *judicial* norm of self-restraint.[79]

Away from the *numerus clausus* debate, the values of untidiness in property have been more generally observed. Carol Rose sees property law optimally as a self-adjusting balance between the certainty of *crystalline* statute and the pragmatism of the common law's *mud*.[80] Muddying the waters may be messy, but it provides necessary relief to the jagged unintended consequence of statute.[81] Joseph Singer goes further, arguing that contrary to the intuitive view, flexible *standards* are more important to predictability in property law than fixed, certain *rules*.[82] Singer calls these variables the 'rules of reason' that 'rule property law'. The reasons that courts 'eschew clarity in favor of ambiguity' is that '[p]roperty law is simply too complicated and too contextually nuanced to be rigidly defined by categorical rules.'[83] Ambiguity is on balance more useful to property law than not.

> Ambiguity promotes moral reflection, allows us to shape property rights to promote our deepest values, deters fraud and abuse of rights, and allows individual property rights to be made consistent with each other through regulating the systemic effects of the exercise of individual rights.[84]

To recognize that diverse property is customized is to accept that it can be nuanced. But it is not to concede that it is unprincipled. There is a middle course between the extremes of property's polarities; the unyielding rigidity of the 'closed list', or the infinite possibilities of laissez-faire customization.

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[79] For example, the pastoral lease in s 66 *Land Act 1948* (NZ).
[80] Carol Rose, ''Crystal and Mud in Property Law' (1988) 40 *Stanford Law Rev.* 577.
[81] A Brower and J Page, 'When the Law is Silent, Trespassers W…: Law and Power in Implied Property Rights' (2012) 42 *Environmental Law Reporter* 10 242, 10 244.
[82] Joseph Singer, 'The Rule of Reason in Property Law' (2013) 46 *UC Davis Law Rev.* 1369, 1373. Singer goes 'further' - it is not about balance between statute and common law, but the supremacy of standards over rules.
[83] Ibid, 1404. Henry Smith's 'modular theory' of property is premised on similar rationales. Smith argues that property needs to be reduced to manageable inter-connected modules because of its inherent complexity. What we see in property is the 'module' not necessarily the whole edifice. Smith, above n30.
[84] Singer, above n82, 1434. Singer also cites (at 1385) Lehavi's view of property rights as 'inherently incomplete' as consistent with his 'rules of reason' analysis, Amnon Lehavi, 'The Dynamic Law of Property: Theorizing the Role of Legal Standards', (2010) 42 *Rutgers L.J.* 81.

Judges refer to the guidance of property's 'principled parameters.'[85] Henry Smith sees the mediation of 'things' as giving property its *in rem* character,[86] since property law is after all the 'law of things.'[87] Hanoch Dagan likewise demonstrates that plurality can be reconciled with principle.[88] Eclecticism is a challenge to property's 'logic of centrality', the uncritical assumption that 'property is what we expect it to be'. But it is also 'a mindset that is conformist, unreflective, and narrow'[89], in short, unimaginative. Often context may yield property relationships that are 'not always a good thing.'[90] Yet it also shows that property, much like communities and urban landscapes, is 'indelibly human.'[91]

2.8 Conclusion

Reimagining property in land as a mosaic of 'property diversity' is to shift focus, to lift our eyes from the self-limiting hegemony that is the private ownership paradigm. It is to see something familiar, but from a different, much higher vantage point. In gaining altitude, we see the constraints that bound our current imaginings of property, and the narrowness of our present vision. The following Part 3 proceeds to identify the constituent elements of the property mosaic that this heightened perspective throws into sharper relief.

3. What comprises the mosaic? Property types and values + Property interests + diverse 'ownerships' of property

The 'property mosaic' is a converged model, where property types and their commensurate values intersect with a plethora of property interests and divergent concepts of 'ownership'. It is a jumbled mix of orthodox and *sui generis* property in land, drawing hybrid strength from its heterogeneity. It is,

[85] Lord Millett quoted in from Mark Wonnacott, *Possession of Land* (2006).
[86] 'An in rem right originally meant a '"right in a thing." Smith, above n30, 1691.
[87] Ibid.
[88] Dagan, above n57.
[89] AJ van der Walt, 'The Marginality of Property' in Alexander & Penalver, above n33.
[90] Personal correspondence with the author, May 2013.
[91] Nicholas Blomley, *Law, Space, and the Geographies of Power* (1994).

to borrow Hanoch Dagan's description of private property plurality, a full (and sometimes cacophonous) symphony, not a singular melody line.[92]

This part 3 deconstructs this symphony into its constituent parts. First, it examines property *type*, private, public and common property in land, and their respective values. It reiterates the conclusions reached in earlier chapters: that private property's absolutist right to exclude is flawed, that public property has been obscured by private rhetoric, and that common property is more obvious than supposed. It describes not only a physical confluence of property type, but also a confluence of property values, a normative 'mosaic' that matches the mix of property type on the ground. Second, it describes the mosaic's elements, the mélange of property *interests* in land, corporeal, incorporeal, and otherwise that spills across the boundaries of type. Third, it canvasses the many meanings of *ownership* both within and beyond the private modality.

3.1 A confluence of property type; physical and normative

To see the 'property mosaic' is to see private, public, and common property *in situ*. It is to lift and widen one's perspective, to recognize that 'property' in land is not constrained by a monistic paradigm. Chapter 1 enables this envisioning by its analysis of the right to exclude, the descriptive paucity that records only absolutist interpretations of exclusive possession, not nuanced understandings of exclusive use.[93] The latter allows for plurality, the co-existence of multiple and simultaneous interests in land: private, public and common. Chapter 2 canvasses the varieties of public property type, the 'more the merrier' implications of public ownership, and the scope of its right of inclusion. And chapter 3 posits that common property is neither an oddity nor a tragedy, but a viable and more obvious player in the contemporary 'mosaic' than we suppose. Cumulatively, the net effect is the property mosaic, a

[92] Dagan, above n57. The analogy is both borrowed and modified.
[93] Freyfogle says use rights must be coupled with a qualified right to freedom from interference.

faithful image of propertied human landscapes, described in the case studies of part 5, and pictured in part 6 of this chapter.

The complementary *values* of property have also been canvassed in the opening chapters. Chapter 1 discusses the strengths of private property; its security of title, durability, and clarity that have unleashed the economic potential of land, the acquisition of private wealth through commoditization, and land's efficient and productive use. Public values provide a welcome foil; inclusion, and a macro-sociability premised on the widest 'comedy of the commons'. Public property in land is also democratic, a forum open to all, while away from the maddening crowd, public wilderness allows for self contemplation and solitude. Critically, public property fulfills a function of *propriety*, where the public estate endows well-ordered communities with a capacity for human flourishing. Chapter 3 completes the normative mosaic by highlighting the under-regarded values of common property; the micro-sociability of community and belonging, its environmental norms of prudence, responsibility, and moderation, and its example of use rights untainted by tragedy. As Michael Brill observes, common property provides for 'community life', which is often confused with 'public life.' Each is different, in scale, density and the 'physical environments it needs to be robust.'[94] Brill describes the sociability of public space as one 'with a diversity of strangers' while the sociability of community space is one 'with people you somewhat know.'[95] Each imbues 'important graces, tolerances and social learnings [that] are becoming lost to us'[96] as community and public life is displaced by an 'exaggerated private domain.'[97]

The 'exaggeration' that Brill identifies is not always simply one of private versus public normative dominance. It is also a skewing of the relative values

[94] Michael Brill, 'Problems With Mistaking Community Life for Public Life' (2002) 14(2) *Places* 48, 50.
[95] Ibid, 48. Brill identifies community sociability occurring at varied locales, 'a mix of both semi-public and semi-private places, like the neighborhood bar, the often- walked public street, the school PTA meeting and the church dinner.' Public sociability occurs 'in the square, park and street.' Ibid, 50.
[96] Ibid, 49.
[97] Ibid, 51.

of private property itself. Private property is more complex and multivalent than its exclusionary or 'land as commodity' rhetoric suggests. Private property has values important to personhood: the protection of privacy, the promotion of self-expression, or the securing of personal autonomy and choice.[98] It also has overlooked or forgotten social and communitarian values.

> A great deal has been written about the individual values that property rights serve: autonomy, liberty, individual actualization, development and self-expression. There can be no doubt that such values are crucial to our understanding of the institution. Less has been written about private property's collective or communitarian values…. Such understandings are equally important in explaining and justifying private property, and in simply understanding the institution's fullest, socially situated dimensions.[99]

Gregory Alexander sees private property's collective values in terms of 'inclusiveness' (the opportunity to join and belong) and 'community' (the facilitating of social relations). [100] These values reflect the reality that much of contemporary sociability occurs on private lands, 'the strip, shopping malls, atriums of skyscrapers, casinos, sports arenas, amusement parks, [or] racetracks.'[101] Brill observes that the modern migration of public or community life to private space has the curious effect of masking the inherent sociability of private property. Brill attributes this to the less 'esteemed' sociable activities that occur in these 'private commons', the hedonism of 'spectacle, entertainment, the (sometimes anti-social) testing of social behavior, and the consumption of … objects of commerce and trade.'[102]

The ownership of private property may also be virtuous. David Lametti sees the contribution of private property's under-regarded communitarian values in

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[98] Gregory Alexander, 'Property's Ends: The Publicness of Private Law Values' (2013) *Cornell Law Faculty Working Papers*, Paper 107. Alexander lists 5 'personhood-like' values: autonomy, personal security/privacy, self-determination, self-expression, and responsibility.
[99] Alexander and Penalver, above n33, 4.
[100] Public values include equality (egalitarianism), inclusiveness (the opportunity to join and belong), and community (facilitating social relations). Alexander, above n98.
[101] Brill, above n94, 53.
[102] Ibid.

terms of *social wealth,*[103] a mutually symbiotic concept where the attainment of individual virtue in turn enhances community virtue, and vice versa.[104] The clues to understanding this 'less than well understood, social aspect of private property'[105] lie in the ethical underpinnings of 'virtue ethics' scholarship, Aristotlean notions that private ownership is meant to serve, promote, or develop individual virtue. In particular, ownership of private property helps an individual develop the virtues of *moderation* and *liberality*, which in turn, as virtues of good conduct, benefit one's community. In a mutually reinforcing way, a virtuous community comprises virtuous citizens. *Moderation* of private ownership is contrasted to immoderation, the pursuit of property for its own accumulation. *Liberality* refers to the use of property 'for the sake of generosity to deserving friends', somewhere 'between the extremes of prodigality and meanness.'[106] Liberality and moderation permeate Joseph Singer's description of the 'uncommonly decent' Aaron Feuerstein; the factory owner who re-built his marginal textile mill in Lawrence, Massachusetts after it was destroyed by fire, and paid his workers during the lay-off to avoid the devastating impacts his withdrawal of capital would cause.[107] Feuerstein personifies the object of virtuous private ownership, 'a set of individual virtues…greater than the sum of its parts, [one that] leads to a collective state that is happy, just, and good.'[108]

3.2. An array of real property interests

Not only is the property mosaic one of diverse types and values, it is also a compendium of diverse real property interests: a functioning system of corporeal estates, incorporeal interests, and *sui generis* partnerships of public, private and

[103] David Lametti, 'The Concept of Property: Relations through Objects of Social Wealth' (2003) 53 *Univ. Toronto LJ* 325.
[104] Aristotle expresses the role of private property as 'private in possession but common in use.'
[105] Alexander and Penalver, above n33, 5.
[106] Lametti, above n103, 19.
[107] Joseph Singer, *The Edges of the Field: Lessons on the Morality of Ownership* (2000) 3-4; 7-17.
[108] Lametti, above n103, 22.

community owners. Its individual parts may appear to operate in isolation,[109] yet as chapter 5 discusses, the mosaic is optimally an integrated network, best understood as a functioning whole. As the sum of many parts, this section will attempt to categorise, and in turn identify, those real property interests that make up each loose category of the mosaic. As a precursor to the remainder of this chapter and chapter 5, each interest will also be briefly considered in terms of its utility in achieving 'good land use' ends.

3.2.1 Corporeal estates

It is possible that modern real property interests can be simultaneously abstract and corporeal; a paradox that is often not seen for the curious anomaly it presents. However, as a traditional classification, it is convenient for the purposes of property diversity with its implicit admission that (at least some) property in land is tangible, and hence contextual.

Corporeal estates in modern land law usually comprise the fee simple and freehold life estate. In some jurisdictions, the fee tail may limp on. If one discards the feudal fiction of chattels real, the leasehold is another corporeal estate in land.[110] Each is an interest in the property mosaic, a *right to use* for a duration that varies from an infinite uncertainty to a certain term of years.

The fee simple is the most important of the modern corporeal estates, indeed it is 'universalising and totalising' of the category as a whole. Yet despite its near omnipotence, the absence of scholarly scrutiny of the fee simple is another paradox. Simon Douglas notes that 'surprisingly little is written about its content', perhaps because of our 'strong intuitive grasp of what it means to own land.'[111] Douglas posits that fee simple owners enjoy 'open ended' liberties to use

[109] Smith outlines a 'modular theory of property as a law of things' that limits a seeing of property to the relevant self-contained module. This module appearance masks the inter-modular connections that exist. Smith, above n30.
[110] The lease is rarely mentioned as a tool for sustainability, Adrian Bradbrook, 'The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector' in *Property and the Law in Energy and Natural Resources* (2010).
[111] Simon Douglas, 'The Content of a Freehold: A Right to Use Land?' in N P Hopkins (ed.) *Modern Studies in Property Law* (7th ed., 2013) 359.

land,[112] a 'right' better explained by the under-scrutinised right to use than the dominant 'exclusion thesis.'[113] As a property tool for sustainability, the fee simple is a blunt instrument with limitations. Seen within the property monotone, it manifests in private environmental organisations purchasing conservation lands, either in perpetuity or through 'revolving fund' transactions. As a stand-alone strategy for conservation, the fee simple is limited by high acquisition costs, succession issues where ownership is ostensibly perpetual, or the belief that conservation is not served by a retreat into enclaves.[114] Richard Brewer lists 'transactions costs, initial capital expenses, and costs of continuing stewardship.'[115] State owned national parks and conservation reserves represent the *public* fee simple. They are impacted by similar restraints - the scarcity of taxpayer dollars and identical concerns about enclave retreat.[116]

The life estate is more an outlier. It is rarely cited in sustainability literature, despite it possessing a common law doctrine concerned with intergenerational consequence, the law of waste. While a possessory estate, its doctrines strongly focus on *use rights* of the life tenant, be it rights to income, timber or emblements. Its characteristics are prescient of (the equivalent of) Sax's economy of nature.

> In a sense all landowners are life tenants, albeit the fee simple owner has an estate of potentially infinite duration… All landholders hold their interests for the benefit of posterity as well as their own use. Landowners are thus trustees for the future.[117]

Corporeal estates need to be seen in context, as one category in a diversity of real property interests. Similarly, *within* the category, the fee simple needs to be

[112] Douglas relies on a Hohfieldian analysis in reaching this nomenclature. These liberties may be constrained by external regulations such as planning or environmental laws, but their 'open-ended' nature remains fundamentally unimpaired. Ibid.
[113] Ibid, 360.
[114] The alternative is 'preserving entire ecosystems of public and private property.' Sally Fairfax et al, *Buying Nature, The Limits of Land Acquisition as a Conservation Strategy 1780-2004* (2005) 254.
[115] Richard Brewer, *Conservancy The Land Trust Movement in America* (2003) 133
[116] Fairfax et al, above n114, 256.
[117] John Cribbet 'Concepts in Transition: The Search for a New Definition of Property', (1986) *U. Ill. L. Rev.* 1, 40.

seen as one freehold estate, and not the defining paradigm. A consequence of seeing corporeal estates through this taxonomic context is to recognize what is common to all corporeal estates, an entitlement to *use* land distinguished by different durations.

3.2.2 Incorporeal/less than fee interests

The diversity of real property interests is more apparent with incorporeal interests. Easements and covenants are regular features of propertied landscapes, and along with the lesser known profit a prendre, positively or negatively regulate the *use* of land. However, as discussed, incorporeal interests are typically seen as burdens on corporeal estates, hierarchically less significant, and thus diminished.

In exemplifying sustainable practice, easements have been adapted to protect scenic corridors, or to secure solar access to solar collector panels.[118] Its limitations include the need for transactional consent and a common law reticence to protect aesthetic values. However statutory intervention can supervene.[119] Covenants, positive and restrictive, likewise are widely employed to achieve environmental outcomes.[120] In particular, positive covenants can impose stewardship obligations on future landowners, again with the assistance of statute.[121] Chapter 2 has already traversed the popularity of conservation covenants to protect biodiversity corridors, open space, and so on.[122] More novel applications include the preservation of dark sky preserves.[123] The ancient profit a prendre can also be re-tooled, as a device to sequester carbon, although its essentially extractive nature is

[118] Bradbrook, above n110, 397.
[119] For example the US scenic easement has been put on a statutory footing, while easements of necessity can be imposed where reasonably necessary for the use and enjoyment of the benefitted land, s 181 *Property Law Act 1974* (Qld), s 88K *Conveyancing Act 1919* (NSW).
[120] Such as guaranteeing wind access to turbines, Bradbrook, above n110, 401.
[121] The rule in *Austerberry Corporation* precludes the burden of positive covenants running with land, but in most jurisdictions statute has validated positive covenants, s 97A *Land Title Act 1994* (Qld).
[122] Douglas Farr, *Sustainable Urbanism Urban Designs with Nature* (2008) 93-4, 120-3.
[123] John Copeland Nagle, *Laws Environment How the Law Shapes the Places We Live* (2010).

problematic.[124] The common law's adaptability also leaves open the potential for obsolete incorporeal hereditaments to be future tiles in the diverse property mosaic. These include the rentcharge, franchise,[125] or profit a rendre.[126]

Nor is the property mosaic restricted to traditional incorporeal interests. Imaginative *sui generis* rights such as grassbanks,[127] solar access rights,[128] or conservation banks[129] expand the seemingly exponential plurality of what can constitute an incorporeal interest in land.

3.2.3 Public/private/community partnerships

Other 'interests' in land fall outside of, or crossover, the arbitrary distinction of corporeal versus incorporeal. Sally Fairfax and her colleagues describe the rise of partnerships or collaborations between public, private and community actors as the defining feature of modern conservation.

> Multiple agents now own partial interests in a single parcel of land for a wide variety of purposes that are often in conflict. The result…is an interlocking network of policies and actors that defies easy categorization. Neither regulatory or market based, neither public nor private, the result is best described as an emerging mosaic of claims on land.[130]

According to Fairfax et al, four factors make these partnerships the new norm. These include a changing philosophy of governance, (where governments vacate or downgrade their role in land use management to private actors or

[124] s 88AB(2) *Conveyancing Act 1919* (NSW).
[125] Kevin Gray identifies the *franchise* as a forgotten incorporeal interest in land, Kevin Gray, Regulatory Property and the Jurisprudence of the Quasi-Public Trust', (2010) 32 *Sydney Law Rev.* 237, 248.
[126] The profit a rendre is a right 'to go onto land to add something to the land that is of benefit to it', MacDonald et al, *Real Property Law in Queensland*, (3rd ed., 2010) 714; Brendan Edgworth, 'Profits a rendre: A reincarnation?' (2006) 12 *Australian Property Law Journal* 200.
[127] Grassbanks are a species of tradable development rights, see chapter 5; Richard Register *Rebuilding Cities in Balance with Nature*, *Ecocities* (2006) 261.
[128] 'Solar rights' are created through a Declaration of Covenants, Conditions & Restrictions (CCRs) in Village Homes, Judy & Michael Corbett, *Designing Sustainable Communities Learning from Village Homes* (2000) 35, 163.
[129] Nagle, above n123, 86-7.
[130] Fairfax et al, above n114, 8.

quasi-autonomous entities), changing conservation goals over time, changing economic conditions, and changing ideas about property.[131] The latter is especially critical. Post- bundle, 'a continuous reinterpretation of property has resulted in complex ownership ideas and …increasingly fragmented and intricate arrangements among public and private actors.'[132] Fairfax concludes on balance that this is a good thing, representing 'at best… a new, collaborative and sophisticated approach that can approximate the elusive win-win model so frequently touted in conservation circles.'[133]

Multi-ownership collaborations can be formally structured and documented, such as the Malpai Borderlands Trust outlined in chapter 5, or they may be informal groupings that 'just happen' in response to threat or exigency. Amnon Lehavi describes such haphazard groupings as 'limited management commons' discussed in chapter 6. While governance of formal joint ventures may depend on black letter law and enforceable rules, governance of informal groupings often depends on a blend of law, social norms, and co-operative strategies.[134]

The 'rise' of the amorphous multi-owner partnership, whose 'rules' define 'who gets to do what and where' as an incident of land ownership, demonstrates a diversity of interests in land that transcends traditional classifications. Instead of 'what is property in land' being confined to the all-pervasive, all-encompassing fee simple, property diversity offers the imaginative possibility of so much more.

3.3 Diversity of property ownerships

This part concludes by canvassing the conceptual breadth of what constitutes 'ownership' of interests in land, both from within, and outside, the private liberal paradigm. Some of these concepts have already been traversed in

[131] Ibid, 9-11.
[132] Ibid, 10.
[133] Ibid, 272.
[134] 'The governance of urban public space by informal collective action' Nicole Garnett, 'Managing the Urban Commons' (2012) 160 *Uni. Pennsylvania Law Rev.* 1995.

earlier chapters, others will be considered in greater detail in later chapters 5 or 6.

Within the property monotone, 'ownership' of land demands that 'propertiness' is restricted to state-enforced private rights that 'run with the land.' Concepts of private ownership only vary as to the measurable impact of their external effects. At one end of this short spectrum, an owner may be sovereign of their 'castle'. At the other, their ownership is (variously described) as a 'citizenship, good neighbor or environmental' construct.[135] The 'castle' view is a rhetorically powerful caricature, derived from a selective interpretation of recent property history.[136] The castle owner is supposedly free to raise the drawbridge, and ignore trans-boundary effects of adverse land uses. Joseph Singer is highly critical of this interpretation. Singer prefers the latter understandings because they import obligation alongside property right, and take account of harmful land uses.

> The castle … models of property over-emphasize individual rights, while the citizenship model rests on the notion that owners have obligations as well as rights… Obligation is inherent in liberalism, but the castle and market models marginalize it. They seek to suppress consciousness of the obligations inherent in ownership, to draw our attention away from them.[137]

Ownership can also embrace common property rights of ownership, described in its traditional form as an 'ownership without possession.'[138] As chapter 3 argues, these common ownerships, traditional but especially modern, are more obvious than supposed. 'Ownership' of public property is far more contestable and esoteric, a diffuse 'sum of interests in which the individual concerned has no greater claim than any other member of the public.'[139]

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[135] Joseph Singer, 'The Ownership Society and Takings of Property: Castles, Investments and Just Obligations' (2006) 30 *Harv. Envtl. L. Rev.* 309.
[136] See chapter 1 - Blackstonian and Lockean interpretations of private property.
[137] Singer, above n135, 330.
[138] J Neeson, *Commoners: common right, enclosure and social change in England, 1700-1820* (1993).
[139] *Stow v Mineral Holdings (Australia) Pty Ltd* (1977) 51 ALJR 672, 679.

Alternative claims to 'what is ours' derive legitimacy from theories such as Andreas van der Walt's 'marginal' perspective on property law, where the analytical focus is on 'dissent and contention rather than consensus.'[140] In a similar vein, Nick Blomley argues that the ownership claims of society's marginalized, concretized in claims to 'community-owned' property, are acts of resistance against the ongoing enclosure of non-private rights. Apart from contest, other bases for collective ownerships include adherence to customary practice, or the observance of social norms.[141]

Communitarian ownerships by their very non-alienable nature must necessarily concern the 'property as propriety' half of the dialectic. To claim a vested interest in such an amorphous subject matter is to articulate non-paradigmatic ideas like 'property as belonging'. Davina Cooper argues that this 'quite different understanding of property' yields an ownership in community assets that is 'constitutive of community life.' Cooper does not dismiss the private ownership model, but says that its deficiency lies in its failure to capture the full picture of what ownership entails. By ignoring property's norm of inclusion, private ownership 'not only misses but also misrecognizes what is going on.'[142] Ultimately, the gap between 'ownership as belonging' and illusory ownership, such as Kevin's Gray's discourse on a proprietary place in a queue, is wafer thin. Yet, despite it's jarring with property's 'central logic', the literature continues to give voice to these alternative claims. Importantly, property diversity, by its inclusiveness, is open to this vast array of ownerships. Thomas Merrill's 'property strategy' (perhaps unintentionally) sums up this open-ended approach.

> The point is that the property strategy is not limited to rights that enjoy the imprimatur of law or even of the customs of the relevant social unit… It also operates inside households, business firms, schools and universities (think of faculty offices). As long as there is a discrete resource and someone who

[140] AJ van der Walt, 'The Marginality of Property' in Alexander & Penalver, above n33, 103.
[141] Robert Ellickson, *The Household: Informal Order Around the Hearth* (2008).
[142] Davina Cooper, 'Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32(3) *Law and Social Inquiry* 625.

> exercises residual management authority and residual accessionary rights with respect to the resource, the property strategy is at work.[143]

The diverse property mosaic is a messy human network of the private, public, and common estates, and modern variants of all three. It infuses diverse property values into human landscapes, and functions through a working system of real property interests that are traditional and novel. Its sense of 'ownership' of interests in land is broad, and reflects the vast diversity of relationships that people have with their propertied landscape. Having examined its core principles in part 3, and now its discrete elements, it is timely to 'test' property diversity beyond simply describing it. Parts 4 and 5 set out to do this, by searching for signs of the property mosaic in the literature of sustainable communities, and then to 'look more carefully' for it through the prism of specific case studies, to reveal that in actual place 'there is a diversity of property on the ground.'[144]

4. The property mosaic in sustainable communities literature

Nick Blomley comments that 'the centrality of the ownership model renders other modalities of ownership *invisible*.'[145] Yet the recent literature of sustainable communities[146] suggests otherwise. It observes that communities showcased as successful models of 'livability' feature property diversity in their design or functioning. In so doing, this literature reveals diverse property to be *visible.* It provides a glimpse from that higher vantage point, a re-imagining of property in land where sustainable cities are capable of being *seen* as 'intensely propertied places'. This part 4 observes that many sustainable communities are property diverse. It does not claim however that diversity is determinative of sustainability *per se*; it merely notes this under-regarded coincidence.

[143] Thomas Merrill, 'The Property Strategy' (2012) 160 *Uni Pa Law Rev.* 2075-6
[144] Blomley, above n49, 9.
[145] Ibid.
[146] Also referred to as sustainable urbanism or sustainable design. It covers diverse disciplines - planning, architecture, landscape architecture, public policy, and urban design. It is 'recent' in the sense of its 1960s origins.

It begins with Jane Jacobs' seminal study of American urban space in the early 1960s, 'The Death and Life of Great American Cities.'[147] Jacobs deduced that vibrant cities possess *city diversity*, a complex quality of 'intricate urban mixtures'[148]. To generate a requisite 'exuberant diversity', Jacobs isolates four conditions as indispensable; that communities must serve more than one primary function[149]; that city blocks should be short and thus 'opportunities to turn corners … frequent'; that a 'closely grained' mingling of buildings of variable age and condition was essential, and that there is a 'sufficiently dense concentration of people' including residents.[150] Significantly, *city diversity* relied on a congenial interplay of public and private property.

> In our American cities, we need all kinds of diversity, intricately mingled in mutual support…. Public and quasi-public bodies are responsible for some of the enterprises that help make up city diversity – parks, museums, schools, most auditoriums, hospitals, some offices, some dwellings. However most city diversity is the creation of incredible numbers of different people and different private organizations, with vastly differing ideas and purposes, planning and contriving outside the formal framework of public action. The main function of city planning and design should be to develop… cities that are congenial places for this great range of unofficial plans, ideas, and opportunities to flourish, along with the flourishing of the public enterprises.[151]

Jacobs could be writing of the multiple values of private property in her reliance on the private estate to do diversity's 'heavy-lifting': commerce, personhood, sociability, or personal autonomy. Yet private property cannot do it alone, public property is an 'anchor' around which a multiplicity of private uses swirl and coalesce. It is the duty of the (smaller) public estate to establish itself at key locations that 'add effectively to diversity', and thereafter incumbent on public lands to 'stand staunch in the midst of different

[147] Jane Jacobs, *The Death and Life of Great American Cities* (1961).
[148] Ibid, 150.
[149] This compels the sharing of common spaces at different times by different people.
[150] Jacobs 150-151. Jacobs stressed that 'the necessity for these four conditions is the most important point this book has to make.' Ibid, 151.
[151] Ibid, 241.

surrounding uses, while (private) money rolls around them and begs them to roll over.'[152] The public/private interaction is symbiotic, city diversity depends for its flourishing on well-positioned, defiantly 'staunch' public amenities, compact city blocks crisscrossed by a network of walkable public streets, lanes and sidewalks, and a vibrant blend of private land uses in close and dense proximity.

Jacobs' work is pioneering in its prescience, its intuitive yet simple understanding of what makes successful cities flourish.[153] Largely seen as the planning equivalent of Rachel Carson's 'Silent Spring', *The Death and Life of Great American Cities* foresaw the essentiality of *diversity* in healthy cities. It also highlighted the interaction of public and private land as a mechanism by which that diversity is established and then maintained, an idea resurrected 30 years later in James Kunstler's *The Geography of Nowhere*.[154] Jacobs' analysis continues to inform literature in this field.[155]

This part argues that property diversity may be *seen* in sustainable communities literature in three distinct ways. First, it may be seen as Rose's literal *picture*, visible in a community's physical layout of private, public and common spaces. Optimally, these property patterns result in the convivial neighborhoods of the 'new urbanists',[156] where parks, community food gardens, cycleways, and walkable streets and footpaths successfully integrate with surrounding private property. Second, (and as a corollary of the first)

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[152] Ibid, 254-5.

[153] Jacobs also wrote of cities lacking the four *indispensable* conditions, 'virtually all of Detroit is weak on vitality and diversity…it is a ring superimposed upon ring of failed gray belts.' Ibid, 150. The 2012 film 'Detropia' cited low population density and diffuse city blocks as key factors in that city's terminal decline, and affirmed Jacobs' 'great blight of dullness.' Ibid, 357.

[154] James Kunstler, *The Geography of Nowhere* (1990).

[155] Farr describes 'great neighborhoods' as possessing walkable size, a mix of land uses and housing types, an integrated network of walkable streets, and sites reserved for civic purposes – 'civic buildings should occupy landmark sites that are the permanent anchors for community pride.' Farr, above n122, 130. Brill writes of 'public buildings that are proudly located.' Brill, above n94, 51.

[156] New urbanism 'asserts that our communities must be designed to re-establish and reinforce the public domain, that our districts must be human-scaled, and that our neighborhoods must be diverse in use and population.' Peter Calthorpe, *The Next American Metropolis: Ecology Community and the American Dream* (1993) in The Sustainable Urban Development Reader (2nd ed., 2009) Stephen Wheeler & Timothy Beatley eds. 90; Paula Franzese, 'Does it Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community', (2002) 47 *Villanova Law Rev*. 553.

diversity can be seen as a *narrative*, the stories by which a community's propertied physical environment adds to, or detracts from, its 'social capital'. Third, property diversity can be seen as a *metaphor* of competing property values, principally the contest of communitarian versus individual, equally analogized in Gregory Alexander's *property as commodity* versus *property as propriety* dichotomy.

4.1 Property diversity as a literal picture

Seeing property diversity as a *picture* is to recognize its separate constitutive parts, the discrete elements that comprise the variegated patchwork of private, public and common lands, the physical infrastructure of community. Two components of this patchwork that are the subject of much study in sustainable communities literature are sidewalks and open spaces. Each is visible (either because of their presence or absence), each illustrates the importance of public or community property contributing to the 'livability' of sustainable communities, and each highlights the interaction of private and non-private property in urban settings.

The sidewalk was the subject of the three opening chapters in Jacobs' 1961 classic.[157] Sidewalks (along with streets and lanes) are foundational to Jacobs' *small city blocks*, one of her four generators of *city diversity*. As public conduits, sidewalk networks provide countless opportunities for planned and unplanned civic interactions, where street corners 'are often turned'. Pre-dating Carol Rose's writings on the sociability of public property, Jacobs describes Boston's North End in 1959 as a place 'alive with children playing, people shopping, people strolling, people talking. The general street atmosphere of buoyancy, friendliness and good health was so infectious that I began asking people for directions just for the fun of getting in on some talk.'[158] Post-Jacobs, sidewalks and other public rights of way are

[157] Chapter 2 - The use of sidewalks safety; chapter 3 - The use of sidewalks: contact, and chapter 4 - The use of sidewalks: assimilating children. Jacobs, above n147.
[158] Jacobs, above n147, 9.

consistently identified as essential to the creation of convivial, 'walkable' neighborhoods.

An alternative perspective on sidewalks is that of legal geographer Nicholas Blomley, and his identification of an all-pervasive 'pedestrianism' as the dominant logic of sidewalk governance.[159] Blomley argues that sidewalks are simply functional spaces for pedestrian circulation, 'a conduit for purposeful, directed flow'[160] from points A to B. Alternative explanations of the sidewalk as sites for protest (political space) or the promotion of civic society (civic space) are subsumed by the 'technical and commonsensical'[161] underpinnings of pedestrianism. Interestingly, and most significantly in this context, pedestrianism proves to be a rare counter-example to the premise of chapter 1 - the erstwhile unidirectional propensity of private property to erode public space. Sidewalks are 'staunch' defenders of the public realm that resist private encroachments into the public right of free flow and passage. [162] Despite being a 'fragile commons' or 'finite public resource',[163] Blomley observes a policing of sidewalks that rarely acquiesces to the private expropriation of public space.[164] Indeed the opposite is often truer, 'in Vancouver the sidewalk has been expanded and enhanced by set-back requirements that in essence reclaim a slice of private space for the public streetscape.'[165] That sidewalks are so unequivocally and defiantly *public* sharpens the visibility of property diversity in urban landscapes.

Ian McHarg's 'Design With Nature', published in 1969, is widely acknowledged as a seminal work on the links between open space and sustainable urban design.[166] McHarg argues that 'nature should be integrated

[159] Nicholas Blomley, *Rights of Passage Sidewalks and the regulation of public flow* (2011).
[160] Ibid, 12.
[161] Ibid, 12-13.
[162] 'An encroachment is inherently private, entailing an unlawful intrusion onto public property by a private actor…. They are an avaricious enlargement of an individual's estate and an illegitimate usurpation of a public entitlement.' Ibid, 48.
[163] Ibid, 32.
[164] Ibid, 93.
[165] Register, above n127, 131.
[166] The *Garden Cities Movement* of the late 19th century saw evils in both cities (their 'closing out of nature') and the country ('Trespassers beware'). In Howard's 'Town-Country Magnet' there were 'fields and parks of easy access'. *The Sustainable Urban Development Reader*

into the metropolis', emphasizing the ecological services that open space provides to cities.[167] McHarg also maps open space to urban contexts, putting into green relief its (then) declining incidence.[168] Such maps (to borrow a Carol Rose phrase) 'hit you in the eye', visualizing a rudimentary picture of private and public property. Later literature developed this further, arguing that parks, urban forests, green belts, community gardens, treed street verges, and 'naturalized private backyards'[169]collectively contribute to indicators of city sustainability.[170] These include the presence of ecological corridors and wildlife habitat, the provision of recreational opportunities, the reduction of the urban heat island effect,[171] better drainage and water quality, increased absorption of pollutants, and increased community space and aesthetics.[172] Open space (public, common and private) inculcates the natural environment into urban living, such that cities are seen as 'granite gardens', environments within, not outside nature.[173]

Interestingly, Jane Jacobs did not list parks as one of her four diversity drivers. Indeed, she observed of Boston's North End that 'it has little parkland… everything conceivable is presumably wrong … in orthodox planning terms.' More important than open space to Jacobs was sociability, informed in the North End by its 'very small blocks …badly cut up with "wasteful" streets.' Others observe that poorly frequented parks are sites of anti-social activity, or that green belts on city fringes are latent 'greed belts.'[174]

(2nd ed., 2009) Stephen Wheeler & Timothy Beatley eds. Lewis Mumford championed Howard's 'garden city' movement in the US, Lewis Mumford, *The Culture of Cities* (1938).

[167] Ian McHarg, *Design With Nature* (1969) 67. Services include airsheds, surface water reservoirs, and aquifer recharge areas.

[168] Ibid, 57.

[169] Mark Roseland, *Toward Sustainable Communities* (2009) 45.

[170] Simon Bell & Stephen Morse, *Sustainability Indicators Measuring the Immeasurable* (2nd ed., 2008). In San Francisco, key sustainability indicators relate to open public space, namely 'percentage of the population with a recreational facility and a natural setting within a 10 minute walk, number of neighborhood green street corridors, expenditures on parks, open spaces, streetscapes.' Kent E. Portney, *Taking Sustainable Cities Seriously* (2003) 11.

[171] Green 'wedges' funnel cool, clear air into congested downtown areas, and reduce ambient summer temperatures.

[172] Roseland, above n169, 45-7; Timothy Wheeler & Beatley, above n166.

[173] Sophie Spirn, 'The Granite Garden: Urban Nature and Human Design (1984)' in Wheeler & Beatley, above n166, 140.

[174] McHarg saw green belts as greed belts 'where the farmer sells land rather than crops, where the developer takes the public resource of the city's hinterland and subdivides it to create a private profit and a public cost.' McHarg, above n167.

Such conflicting arguments suggest that seeing property diversity as 'literal picture' is simply one building block in the overall *structural diversity* of sustainable cities. Or it may simply reflect that some public spaces are poorly conceived.[175] Arguably, more significant is the relationship between a propertied urban environment and its accrued 'social capital', the collective narratives that these property pictures tell, and entrench in the communal culture.

4.2 Property diversity as narrative - building social capital

Carol Rose saw 'property as narrative' as one of the key if underrated aspects of her scholarship.[176] To Rose, property is a form of story telling. It helps to explain leaps in doctrinal logic, or smooths over the implausibility of the common law's legal fictions. Its corollary is that property is *persuasion*, a complex, multi-layered tale that must engage and convince its listener for the particular form of property to prosper.[177] In sustainable communities literature, property narratives are discerned in the way that property patterns enrich or pauperize 'social capital'. Diverse property recounts stories of inter-connectivity, sociability and inclusion. Conversely, private uniformity tends to speak of isolation, exclusion and dislocation.

> [C]ommunities must be designed to re-establish and reinforce the public domain, … our neighborhoods must be diverse in use and population. Settlement patterns are the physical foundations of our society and like our society they are becoming more and more fractured. Increasingly they isolate people and activities in an inefficient network of congestion and pollution-rather than joining them in diverse and human scaled communities.[178]

Mark Roseland describes *social capital* as 'the "glue" that holds communities together, 'the shared knowledge, understandings and patterns of interactions

[175] Brill, above n52.
[176] Carol Rose, 'Property and Language, or the Ghost of the Fifth Panel' (2006) 18 *Yale Journal of Law and the Humanities* 1.
[177] Rose, above n6. Orth writes how 'tenancy by entireties' survives in North Carolina by constantly re-inventing its story, John Orth, *Reappraisals in the Law of Property* (2010) 35-45.
[178] Calthorpe, above n156, 90.

that a group of people brings to any productive activity, the relationships, networks, and norms that facilitate collective action.'[179] It is a unique public good; it does not wear out by use, but where unused, its fragility leads to its rapid deterioration, it cannot be readily created, it resists confected construction, and it is inherently non-transferable. In sustainable communities literature, the overriding objective is to *locate* and *multiply* a community's social capital.[180]

Reliant on formal and informal interactions, a community's built (and therefore propertied) environment creates the opportunities that either enable or impede social capital. Formal interactions (such as planned meetings or sporting events) are integral to 'building social capital between (otherwise disparate and isolated) people … and strengthen ties among people already bound by a common thread.' Critically, they can only happen 'where there is a place for them to occur.'[181] Equally important are informal interactions; impromptu encounters whose efficacy depends on physical factors such as 'street layout, (private) building features, … the width of sidewalks.'[182] Whether transactions in private shops or businesses, or encounters on streets, parks, sporting fields, or community-owned clubs or associations, the frequency (and therefore social capital value) of planned or unplanned interactions is multiplied where the built environment is mixed and diverse.[183] It is a recurrent theme of sustainable communities literature that '[t]here is a positive association between social capital and communities with mixed uses, access to civic amenities, and walkable neighborhoods.'[184]

[179] Roselund, above n169, 9.
[180] Ibid, 10.
[181] Caitlin Eicher and Ichiro Kawachi, 'Social Capital and Community Design' in Andrew Dannenberg, Howard Frumkin and Richard Jackson (eds.) *Making Healthy Places Designing and Building for Health, Well-being and Sustainability* (2011) 121
[182] Ibid, 122.
[183] Informal groups can be regular customers of a shop, users of a park…. members of such groups may not necessarily know each other…yet they are an immense reservoir of energy and imagination if it can be accessed and organized.' Roselund, above n169, 11.
[184] Reid Ewing, Gail Meakins, Grace Bjarnson and Holly Hilton, 'Transportation and Land Use' in Dannenberg et al, above n181, 160.

Social capital is commonly located in so called 'third spaces', community-shared 'living rooms'[185] in which social interactions occur away from home or work. Third spaces and social capital are intimate in both their cause and effect, the more time spent in them the greater the return, but 'conversely the more time people spend away from the public eye at home, the more disinvestment there is in community social capital.'[186] Community food gardens meet the definition of viable 'third spaces.' Providing for urban food production not only meets sustainability criteria such as cooling cities, reconnecting people to the food chain, or reducing the carbon footprint of food transport, but it also enhances urban conviviality through social interaction.[187] Howard Frumkin and Jared Fox observe that community gardens build a sense of community, encourage mental and physical well-being, and restore blighted neighborhoods.[188]

More broadly, communities with high levels of social capital tend to be pedestrian-oriented. Pedestrian travel (whether on foot or by bicycle[189]) promotes a 'cycle of informal social interaction' that builds a much stronger sense of community.[190] By contrast, urban sprawl tends to be associated with built environment characteristics that make interactions less frequent, 'reliance on cars has a detrimental effect on civic life, due in part to decreased opportunities for chance encounters.'[191] Urban sprawl is characterized in this literature as typically 'a suburban world of cul-de-sacs, detached single-family houses, single-use zoning and dependence on automobiles',[192] a predominantly private lawscape. Peter Calthorpe sums up the significance of the pedestrian, and its propertied context.

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[185] Beatley & Wheeler, above n166, 335.
[186] Caitlin Eicher and Ichiro Kawachi, 'Social Capital and Community Design' in Dannenberg et al, above n181, 122.
[187] Anthony Capon and Susan Thompson, 'Built Environments of the Future' in Dannenberg et al, above n181, 370-1.
[188] Howard Frumkin and Jared Fox, 'Contact with Nature' in Dannenberg et al, above n181, 237; Farr, above n122, 179-180.
[189] Philippa Howden-Chapman et al, *Sizing Up the City Urban Form and Transport in New Zealand* (2010).
[190] Caitlin Eicher and Ichiro Kawachi, 'Social Capital and Community Design' in Dannenberg et al, above n181, 123.
[191] Ibid.
[192] Calthorpe, above n156, 89.

> Pedestrians are the catalyst, which makes the essential qualities of communities meaningful. They create the place and the time for casual encounters and the practical integration of diverse places and people. Without the pedestrian, a community's common ground - its parks, sidewalks, squares and plazas – become useless obstructions to the car. Pedestrians are the lost measure of a community.[193]

Hollie Lund's empirical study of the relationship between the urban physical environment and its creation of a 'sense of community',[194] strongly suggest that pedestrian-friendly settings contribute to the development of a richer social environment.[195] Lund compared a TN (traditional-era neighborhood) with a MSN (modern suburban neighborhood) in Portland, Oregon. In the former, with its compact rectangular blocks, structured public and semiprivate space, and local stores and neighborhood facilities, there was a reported higher sense of community. Much of this sentiment was based on residents' ability to engage in 'pleasure-driven strolling trips' that arise where 'strollers feel like being part of the neighborhood or feel like running into or socializing with their neighbors.'[196] By contrast, residents in MSNs tended to drive, or engage in 'purposeful destination walks' to neighborhood shops located on the fringes of MSNs, the net effect being a decreased sense of community.

Conversely, a lack of community 'common space' pauperizes its stock of social capital. Mark Roseland observes that ' a community must have commons', meeting places or clusters where social interactions occur. '[A] lack of common space impairs community self-image', and the resultant 'heavy emphasis on the private domain' discourages participation. In its quest to *multiply* social capital, sustainable communities literature stresses the

[193] Ibid, 90.
[194] Lund defines sense of community as 'a sense of mutual aid, neighborhood security, sense of belonging (and) shared values.' Hollie Lund, 'Pedestrian Environments and Sense of Community' (2002) 21 *Journal of Planning Education and Research* 301, 302.
[195] Lund's empirical research endeavors to show the significance of pedestrian-friendly environments 'above and beyond [other] important demographic factors.' Ibid, 311.
[196] Ibid, 310.

desirability of many different 'thoughtful'[197] sites of social interaction, a potential enlivened and enlarged by property diversity.

Diverse property tells more than the singular or dominant story. In particular, its narratives embrace the idea of diffuse[198] ownerships beyond the orthodox private model, sociable tales of community gardeners and strolling pedestrians, of 'belonging' to physicalized third spaces outside the private realm. Such narratives speak of enhanced and frequent interaction, invoking (as sustainable communities literature theorizes) multiplied social capital. The propertied landscape of 'new urbanists',[199] and their fostering of social capital through physical urban design, is one that incorporates key tenets of property diversity, a serendipitous yet noteworthy convergence.

4.3 Property diversity as a metaphor of values

Rose's third way of seeing property, as metaphor, is also discernible in sustainable communities literature. It occurs as the symbolic representation of property's competing individualistic and communitarian values. While private lawscapes chiefly enact the values of the former, the composite mosaic makes room for the latter. And in recognizing that property is multivalent, the mosaic also highlights the inherent tension between the two.

This tension forms the basis of Gregory Alexander's under-regarded dialectic of modern property law, *property as commodity* versus *property as propriety*.[200] Alexander argues that the ascendant market-oriented view of property is only 'half-right.' He traces the history of American legal thought from the 18th century to argue that property is not monistic, that it has 'multiple meanings and multiple traditions',[201] and that one-half of this continuity is a view of property as propriety. This Alexander defines as 'property [as] the material foundation for creating and maintaining the social order, the private

[197] A 'thoughtful interaction' of public, private, semi-private, and common land enhances 'civicness.' Roselund, above n169, 11.
[198] Joseph Singer, *Entitlement: The Paradoxes of Property* (2000).
[199] Franzese, above n156; Roselund, above n169, 141-2.
[200] Alexander, above n33.
[201] Ibid, 7.

basis for the public good.'[202] Importantly this dialectic has 'normative commitments', with property as commodity based on the value that the 'market is the primary mechanism for mediating *individual* preferences within society.'[203]

In sustainable communities literature, Kent Portney uses a similar historical narrative[204] to ultimately argue that sustainability indicators should not only measure environmental factors, but should also actively foster communitarian values in modern cities. In this way American cities will then faithfully reflect their shared (but presently skewed) traditions of individualism and communitarianism.[205]

> To many advocates of sustainable communities, making cities livable requires changing the fabric of civil society. To state it succinctly, the concept of sustainable communities is fundamentally communitarian in nature… it is a question of public values.[206]

For Portney, sustainability cannot be realized until communitarian values effectively counter the adverse effects of 'rampant individualism.'[207] This occurs when 'great import is placed on the function of civil society, [on] the institutions and social processes that influence how residents interact.'[208] *Public space* is Portney's metaphor for such values. In San Francisco, public space is green space, measured by proximity to natural settings, parks, or treed street corridors. In Seattle it is access to public cultural amenities such as libraries and galleries.[209]

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[202] Ibid, 1.
[203] Ibid, 3.
[204] Portney mirrors Alexander's ideas about competing values in the American tradition, that of individualism vs. communitarianism, arguing (like Alexander) that both have been present in American history from its founding. Portney, above n170, 130.
[205] Such 'social justice' SIs focus on participatory governance and egalitarianism, for example 'how participatory are the processes to develop sustainability plans?' Ibid, 149.
[206] Ibid, 127-8.
[207] These include 'the NIMBY syndrome, the tragedy of the commons, and trans boundary exporting of environmental impacts.' Ibid, 130-153.
[208] Ibid, 125.
[209] Ibid, 11.

Many sustainability indicators are likewise indicia of property diversity. The strategic siting of civic property amidst the private estate; dense, compact networks of sidewalks and public rights of way; the virtues of mixed land use; thoughtful interactions of public and private property in land that generate social capital; or the values of public and community space,[210] all exemplify a common ground, one that speaks to new paradigms, and recognizes the shared flaws of the old.

This literature also illustrates that property 'penetrates everywhere in the realm of daily life'.[211] Theodore Steinberg uses case studies, 'Indians along a river, farmers in a desert, oil companies on a lake'[212] to illustrate this point. In a similar case based study of the effects of environmental laws, John Copeland Nagle observes that 'there is a special need … to recover the importance of place in environmental law.'[213] The same holds true for property. Re-physicalizing property to place is to engage in what Nicholas Blomley calls 'resistant re-mapping.' Part 5 adopts this theme, situating the property mosaic to place, an act of resistance to a paradigm that poorly describes the landscapes in which it is sited.

5. Mapping the property mosaic to place: case studies

The locations selected in this part are 'convenient' in that they are, to varying degrees, the subject of existing study. In at least two cases, they are also 'imperious' landscapes, places of great natural beauty where 'property hits you in the eye.' These two factors make the task of 'mapping' the property mosaic easier, and somehow more credible. However these locations are not exceptional, all human landscapes are 'intensely propertied', such that any locale, mundane or otherwise, could form the content of this exercise.

The settings vary from rural through coastal peri-urban to suburban. In the first case, the mosaic is binary, where one (failed) public property tile is

[210] Noting the differences between the two, Brill, above n94.
[211] Steinberg, above n50, 9.
[212] Ibid.
[213] Nagle, above n123, 252.

substituted by another. In the second, a new mosaic replaces an earlier, more singular property mix. In the third, the mosaic is elaborately designed, a greenfield suburb well known for its sustainability and sense of community. These micro-studies *infer* that each place is better for its property diversity, in terms of either community ethos, the instituting of Aldo Leopold's 'good land use', or both. While these observations preface subsequent discussions in chapters 5 and 6, the primary objective of this part is to simply identify and situate the diverse property mosaic to actual place. In so situating, its objective is *not* to claim that property diversity is the sole or dominant driver for each community's livability, but merely that it is observable, and thus noteworthy.

5.1 The Central Otago Rail Trail, New Zealand

This 150-kilometre rail trial is a publicly owned corridor that stretches from Middlemarch to Clyde in the Central Otago region of New Zealand's South Island. The trail connects to a functioning rail line from Middlemarch to Dunedin, owned by the Dunedin City Council, and operated by a private tourism business. [214]

Construction of the branch railway line commenced in 1879 and was completed in 1921. Prior to World War II, the line carried passengers from the rural region to Dunedin, and freighted fruit, livestock and wool.[215] The line's slow demise began in the immediate post-war years when passenger services gave way to cars, and rail freight lost the regulatory protection that state-owned railways once enjoyed against road freight competitors.[216] In 1990, the line was closed and dismantled, leaving a disused public corridor vulnerable to private encroachment.[217] The slow loss of government services and

[214] Taieri Gorge Limited.
[215] *From Steam Trains to Pedal Power: The Story of the Central Otago Rail Trail* (2004) ('*Steam Trains to Pedal Power*') 11.
[216] For instance in 1961, road freight could only be carried for a maximum of 48 kilometres, ibid.
[217] In Oturehua, a local privately owned freight depot began parking trucks across the disused corridor, effectively privatizing the public lands. In the early 1990s when the NZ Department of Conservation (DoC) started to plan the development of the rail trail, it took DoC several years to re-claim the small section of the trail for public purposes and discontinue the illegal private

enterprises (including the railway) formed a pattern of 'long decades of decline that dispirited the community. So much so, that when the idea for the Rail Trail was first put to the people living along the track, they wondered why anyone would pedal or walk through this barren land with no history.'[218]

Led by the Otago Conservancy, the Department of Conservation (DoC) purchased the corridor from New Zealand Railways in 1993 with the intention of developing the nation's first rail trail. In an era of declining public ownership, this conservation investment was a significant counter-example. Acquired as a 'recreation reserve' under the *Reserves Act*,[219] DoC realized that community 'ownership' of the proposal was vital to its long-term viability.[220] In 1994, the Otago Central Rail Charitable Trust was formed, its stated purpose to

> Establish, develop and maintain the trail and any part of it for public recreation and enjoyment, and to assist and coordinate with the Department of Conservation, any local or regional authority or other group or person in that purpose. Walking, cycling and horse riding uses of the trail shall be paramount.[221]

The Trust became the 'face of the project…. gathering support for the trail as a recreational facility, ensuring its sustainability, coordinating its promotion and fundraising.'[222] With financial and community support from the Trust, DoC re-built the line from 1994 to 2000, re-surfacing the former tracks, re-decking

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use, notwithstanding that the land had never passed out of public ownership. Private conversation, Graeme Duncan, Wedderburn, 29 December 2012.

[218] *Steam Trains to Pedal Power,* 12

[219] Under s 17(1) *Reserves Act 1977* (NZ), the primary purpose of recreation reserves are to provide 'areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside, with emphasis on the retention of open spaces and on outdoor recreational activities, including recreational tracks in the countryside.' The public has 'freedom of entry and access to the reserve' under s 17(2)(a), meaning that entry fees cannot be charged.

[220] DoC was also required to ensure that the 're-development of the line should not impact on or divert funds from other priority conservation work.' *Steam Trains to Pedal Power*, 12.

[221] It also receives and administers donations. It has 4 trustees and a patron 'who provide a geographic spread along the trail and who come form a diverse range of business and community backgrounds.' Many on the trust were the original community leaders who first advocated the idea of a rail trail and lobbied DoC to purchase the line. Ibid*,* 64-5.

[222] *Steam Trains to Pedal Power,* 12.

bridges, and restoring historic infrastructure such as ganger's huts, viaducts and culverts.[223]

The re-development of the rail corridor faced widespread opposition from adjoining private landowners. Farmers feared interferences with agricultural practices, unchecked trespass, and heightened risks of pests and fire. Many thought the corridor should be used for grazing, with sections sold to neighboring landowners. Today, most farmers are happy to be proved wrong. Many embrace the commercial opportunities that recreationalists provide, establishing lodgings or food outlets[224] along the length of the track. The public agency's investment has breathed economic life back into moribund rural communities, and restored the region's pride in its history. Once sceptical private landowners agree with the sentiment that 'DoC had shown a lot of foresight and should be congratulated.'[225]

The trail passes through a majestic, empty landscape of mountains, high country valleys, and tussock grasslands, interspersed by small towns that service grazing industries, a 'land of schists and tors' and climatic extremes. Its stark, rugged natural beauty engenders a sense of belonging that Otago poet Brian Turner describes as 'the surpassing glory of our right habitation of place.'[226] Turner writes of the landscape invoking in him a strong land ethic, a duty of stewardship 'underpinned by an acceptance that life is not all about us but about what's *all* about us.'[227] The advent of the trail has enhanced 'good land use' in the region, 'since its completion many communities have become actively involved in developing the trail further, helping and initiating replacement and restoration of station buildings and creating shade-giving

[223] Ibid, 13.
[224] For example the Duncan family who have farmed at Wedderburn since 1894, established accommodation cottages on their farmland adjoining the track. Personal conversation, 29 December 2012. The track has been described as a 'latter lover's dream', 13. Tourist numbers are estimated at 120,000 per year, including 5,000 who complete the full 150 kilometre journey. The rail trail has 'allowed for significant exposure of the region to hikers, cyclists, and backpackers across all seasons.' David Duval, 'When buying into the business, we knew it was seasonal; perceptions of seasonality in Central Otago, New Zealand' (2004) 6 *Int. Journal of Tourism Research* 325, 327.
[225] Graeme Duncan, 'Community Head of Steam – From a Rail to a Trail' video recording, undated.
[226] Brian Turner, *Elemental: Central Otago Poems* (2012) 14.
[227] Ibid.

plantings of native trees.'[228] Significantly the statutory basis for the trail mandates that 'those qualities of the reserve which contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the reserve shall be conserved', including water, soil, and forest values.[229]

The property mosaic in the Central Otago is a largely private landscape of broadacre grazing stations and small urban holdings connected by a 150 kilometre public conduit, a thin 'ribbon' of public land that now defines the propertied landscape. Although legally structured as a recreation reserve, the partnership between DoC and the Otago Central Rail Trust diffuses DoC's ostensible title to the trail, adding a further nuanced layer of community ownership. Meanwhile the trail's status as statutory reserve impresses upon the agency's bare title a beneficial ownership on behalf of all New Zealanders[230] (one akin to Carol Rose's 'unorganized public'), where sociability becomes the public estate's core rationale.[231] The presence of a vibrant public estate also enhances the value of nearby private lands, engenders a renewed sense of community in the towns along the trail,[232] and inserts into the landscape a statutory obligation to protect natural and scenic resources. The surrounding private estate also shapes the contours of the public right. Similar to the UK *Countryside Rights of Way Act*, a code of conduct requires trail users to 'leave gates as you find them, not disturb stock, and not to venture onto private property'[233], accommodating private values such as productivity and privacy in the exercise of the public right. The trail also fulfills Gregory Alexander's *property as propriety*; property's capacity to enable well-lived human lives, a quality that infuses Brian Turner's ode to 'Biking the Central Otago Rail Trail'.

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[228] *Steam Trains to Pedal Power,* 14.
[229] Section 17(2)(c) & (d) *Reserves Act 1977* (NZ).
[230] *Gibbs v The New Plymouth District Council* [2006] NZHC 231.
[231] Carol Rose, 'The Comedy of the Commons: Commerce, Custom and Inherently Public Property' (1986) 53 *U. Chi. LR* 711.
[232] Carla Jellum & Arianne Reis, *Otago Central Rail Trail Economic Impact and Trends Survey 2008;* Sarah McGregor & Michelle Thompson-Fawcett, 'Tourism in a small town: impacts on community solidarity' (2011) 3 *Int. Journal of Sustainable Society* 174.
[233] *Steam Trains to Pedal Power,* 25.

> From Waipata, north to Wedderburn
> On a clear, still bright autumn Saturday,
> It's airy and eerie on the old rail trail,
> The land sloping right to left
> from the Ida and Hawkdun ranges
> to the Taieri headwaters, the ridgelines
> cut into the sky, the mountains hanging
> as if suspended in air rather than
> rising out of the brown-top land.
> The day's tricked up but not tricked out
> and the line runs straight onto Ranfurly
> and out the other side, going west.[234]

5.2 The Sea Ranch, California

The Sea Ranch is a 4,000-acre planned residential community along ten miles of northern Californian coastline. Devised as an 'open' and 'exploratory' architectural experiment,[235] The Sea Ranch was 'born in the era of Rachel Carson and Ralph Nader, the rise of …awareness of environmental concerns, [and] the introduction of the term ecology.'[236] Its founding ideals were visionary, with landscape architect Lawrence Halprin aiming for

> [a] feeling of overall 'place', a feeling of community in which the whole was more important than the parts…if the whole could link buildings and nature…then we could feel that we had created something worthwhile which did not destroy, but rather enhanced the natural beauty we had been given.[237]

Before its developer Oceanic Properties bought the family owned 'Rancho del Mar' in 1963 the property mosaic was simple, a large, privately owned farm, with a history of ranching and redwoods logging.[238] Any public interest in the

[234] Turner, above n226, 23.
[235] Donlyn Lyndon, 'The Sea Ranch Qualified Vernacular' (2009) *Journal of Architectural Education* 81, 82.
[236] Donlyn Lyndon and Jim Alinder*, The Sea Ranch* (2004) 29.
[237] Ibid, 19.
[238] The Sea Ranch's history is detailed in Susan Clark *Images of America The Sea Ranch* (2009)

landscape comprised the dormant public trust in the wet sands of the beach, and the meandering California State Highway 1. The purchase by Oceanic Properties merely substituted one private owner for another, leaving the basic property pattern intact for the short term.

In 1965 as the development plans gathered pace, a residents association was formed in which common property in the development was vested.[239] The original design was heavily influenced by the 'establishment of large stretches of commons that would preserve the dominance of the natural setting';[240] an effort to share the landscape rather than having it 'sequestered in separate private ownerships'.[241] Fifty percent of all land set aside for open space would be 'held in common for all Sea Ranchers to own and enjoy.'[242] Commons served environmental and aesthetic functions, where 'large areas of commonly held land…would ensure the perpetuation of the coastal ecology.'[243] Commons also had social implications.

> Throughout Sea Ranch, the land held in common, particularly the commons in the coastal meadows became a focal point of shared interest. Management of this treasured asset was expressed as a community responsibility, not a task for individual property owners looking out for their own parcels… That no one citizen exclusively owned a piece of the natural resource- the resource that is the very foundation of the community - …defied conventional development wisdom and cemented a bond of common interest…[244]

As the 1960s ended, another interest was added to the mosaic, an assertive awakening of the public trust interest in beach access and the preservation of coastal vistas. Many started to see The Sea Ranch as an enclave of private privilege, groups such as 'Californians Organized to Acquire Access to State

[239] The resident's association was also charged with enforcing a 'declaration of covenants, conditions and restrictions', title restrictions that regulated building materials and design, but more importantly imposed a strict landscape plan where houses were clustered to mimic the coastal landscape of ridgelines, pastures and hedgerows.
[240] Lyndon & Alinder, above n236, 19.
[241] Ibid.
[242] Lawrence Halprin, *The Sea Ranch Diary of an Idea* (2002) 35.
[243] Lyndon & Alinder, above n236, 19.
[244] Richard Sexton, *Parallel Utopias: The Quest for Community* (1995) 35.

Tidelands' (COAST) complained of it locking up ten miles of access to publicly owned tidelands. In 1968 COAST sponsored an unsuccessful county initiative to force coastal access through almost every mile of the property. A deal with Sonoma County Supervisors, in which 100 acres of public park[245] were traded for public access rights over the ten miles of coastline, attracted much criticism in the early 1970s.[246] Eventually the public interest in coastal access prevailed, with the passage of Proposition 20 that established regional and statewide Coastal Commissions.[247] The planning powers of the North Central Coastal Commission effectively halted The Sea Ranch for eight years through its blanket refusal of building permits. In 1980 the State of California ended the stalemate by entering the mosaic legislatively, in the process asserting all Californians' interest in the beach and unimpeded coastal vistas. The specific state bill[248]ended the planning powers of the North Central Coastal Commission in return for the guarantee of five dedicated access easements, a near halving of the number of house sites[249], and scenic corridors from State Highway 1. The compromise formalized public rights to access and coastal prospect, and imposed public restraints on private rights.

The Sea Ranch illustrates the construction of a mosaic from relatively simple property arrangements in the early 1960s, to a complex inter-connected mix of public, private and common property post-1980. The transition resulted in a shift from a 'look-but-don't-touch' landscape, to one with some public access and entitlement. It resulted in a landscape that was more aesthetically and ecologically sustainable than the landscape constructed by its earlier property patterns.[250] The Sea Ranch's deliberate property structures were designed to

[245] Gifted by Oceanic Properties with the intention of providing the sole public access, alter expanded to 140 acres.
[246] Dion Dyer, 'California Beach Access: The Mexican Law and the Public Trust', (1972) 2 *Ecology L.Q*. 571, 573, 585-6.
[247] Calif. Coastal Zone Conservation Act of 1972 (Proposition 20), codified as Cal. Pub. Res. Code SS 27000 *et seq.* The act also created the Californian Coastal Commission, and had statewide implications for coastal zone land management and recreational beach access.
[248] Bane Bill 1980.
[249] Housing lots reduced from 5,200 to 2,300. Also sites for low-income housing were mandated.
[250] 'What has emerged [at The Sea Ranch] is a landscape with much more vegetation than when Oceanic arrived. In addition to the large-scale plantings, the forest has expanded of its own accord. Invasion of the meadows no longer kept in check by grazing.' Lyndon and Alinder, above n236, 73.

integrate community and social cohesion (a sense of the 'whole' rather than an aggregate of sequestered housing lots[251]); stewardship was articulated in terms of 'lightly living with the land';[252] and the shared nature of the coastal landscape emphasized co-existing uses, not exclusive dominion. Private housing rights adjoined communal use of meadows and community infrastructure, while public rights to the beach, access paths and coastal vistas were enshrined by statute. The blurring of property lines[253] predicted by Joseph Sax in his 'economy of nature' came to pass

> Fences enforcing property lines are discouraged…Where houses are very close together, fences are considered necessary for privacy and for screening cars, but not for demarcating property lines. An intentionally fuzzy line is desired for the boundary between individually owned and community property.[254]

In the (mostly architectural and landscape) literature written about The Sea Ranch, the diverse property mosaic is never far below the surface. The following excerpt, describing the aesthetics of the 'Hedgerow Houses', typifies this invocation of property plurality.

> [As a] model for quiet, thoughtful delineation of common boundaries….the long row of simple board fence at the property line is made as a common face for the public realm, and not as an individuated expression of the private properties beyond it. It speaks of continuity and public purpose…the ensemble creates a place of real distinction - a place that shows respect for the private worlds of each house, as well as for the common realms of street and meadow.[255]

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[251] Halprin's vision was of a 'social community for people of like minds, with a love of nature…for whom "living lightly on this land" would be a governing principle. We decided to imagine the entire ranch as a community of people and design holistically. We would cluster buildings densely as in a farm village, by doing so we could leave at least half the land open for nature, undisturbed. The large common areas around which the buildings would be grouped were to remain open forever and form the matrix of the community.' Ibid, 287.
[252] Ibid.
[253] Another example of the blurring of property lines is the original transitioning between private and common areas designed by its landscape architect, Halprin, above n242, 41.
[254] Sexton, above n244, 36.
[255] Lyndon and Alinder, above n236, 55.

5.3 Village Homes, Davis, California

The third case study is another planned community, the suburb of Village Homes in the university town of Davis, California. A greenfield project, its first homes were built in 1975 with the final build out in 1982. It has been called 'one of the most important and inspiring built examples of sustainable community design in the United States.'[256]

The designers of Village Homes sought to realize two radical objectives, 'helping people live more lightly on the land, and creating a sense of community.'[257] Determined to avoid outcomes of 'only private houses and private yards,'[258] design innovations included narrower, no-through streets, small housing clusters of 8 dwellings, the extensive use of paths and cycle ways,[259] and the dedication of 25% of the site to public and community open space. The latter includes 12 acres of greenbelts and open space, 12 acres of common agricultural land, two village greens, and a community swimming pool and meeting centre.[260] The common lands are subdivided into three typologies; household commons, greenbelt commons and agricultural lands, in which all Village Homes residents hold common property interests. The neighborhood constitution specifies three sanctioned uses of the commons, 'enjoyment, flowers and food, and profit',[261] the latter two referring to widespread planting of edible vegetation,[262] and a 300 tree almond orchard that raises income to offset neighborhood fees. Apart from utilitarian[263] and aesthetic purposes, the common spaces also enhance sociability by providing 'a place and a reason for people to come together, thereby allowing a sense

[256] Mark Francis, *Village Homes A Community by Design* (2003) xi; Wheeler & Beatley, above n166, 418-420.
[257] Judy Corbett and Michael Corbett, *Designing Sustainable Communities: Learning from Village Homes* (2000) 8. These twin objects remain central to the community's rationale, see the Village Homes website at http://www.villagehomes.com.
[258] Corbett, above n257, 3.
[259] These paths connect housing clusters and provide meeting and interactive places for residents, in an echo of Jane Jacobs' drivers of 'city diversity'.
[260] Francis, above n256, 9, 47.
[261] Ibid, 36.
[262] The list of edible plants include grapes, citrus fruit, cherries, apricots, peaches, plums, figs, persimmons, guavas, and almonds. 'With the exception of the almonds, residents are invited to pick whatever they like without charge.' Corbett, above n257, 39.
[263] An important use of the greenbelt commons was to provide for natural drainage swales that capture storm water run-off. Ibid, 43-47.

of community to develop.'[264]Importantly, these commons are 'lived in' landscapes, where good land use is performed. They are not simply manicured 'look at' spaces.

> There are people actually using these open spaces – walking, digging, or playing for example. When empty, there are physical traces of use such as garden furniture, tools, and children's toys. Together this activity communicates a sense of stewardship – people caring for and feeling attached to where they live.[265]

Mark Francis compares Village Homes to the rest of the city of Davis, internationally renowned in its own right for urban sustainability. Taylor observes that visitors to Davis typically fail to perceive the city's reputation, with its conventional, largely private suburban layout. Yet in Village Homes, with its patent common spaces, sustainability is more persuasive, it 'hits you in the eye.'

Village Homes displays several interesting features of the diverse property mosaic. First is the blurring of boundaries, particularly between private and non-private space. The 'household commons' deliberately blends private into common, residences front and overlook the common gardens, not the street, and the differentiation between 'heavily vegetated private and shared land' is not discernible.[266] Covenants preclude internal dividing fences, only carefully planted hedges, trees, or shrubs provide a substitute for privacy. Private outdoor courtyards segue effortlessly into common orchards and drainage watercourses; here the emphasis is on use, not demarcated dominion. If there is any sense of boundary, it is the line that divides Village Homes from the rest of Davis, not internal boundaries within the suburb.[267]

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[264] Ibid, 32. Specific events that foster 'community' include an annual festival that coincides with the almond harvest. The authors conclude that up to 80% of residents regularly participate in communal activities, a factor attributed to 25% of the land being devoted to common open space. Ibid, 140-2.
[265] Francis, above n256, 11.
[266] Corbett, above n257, 37.
[267] Ibid, 140.

Second, and a consequence of the first, is a tangible sense of diffused ownership of common land. In Village Homes this translates into lower crime rates.

> Residents have planned and maintained their commons, they have a vested interest in the spaces, and they have every right to protect these areas from intruders. Even the more public greenbelts are less vulnerable to vandalism than an adjacent park. Residents pay for maintenance of the greenbelts; they have played a part in hiring the gardeners; and they may have participated in planning or building a pool, play structure or orchard. Therefore they have a direct interest in defending the open spaces around them.[268]

Third, is a strong recognition by residents of the distinction between public and common property. This manifests in disputes where outsiders pick fruit from community orchards. Residents enforce their common rights to the produce, posting signs indicating that the fruit trees are on community not public land, and warning against unauthorized picking.[269] And in the official typology of 'open space', there is an explicit characterization of 'streets, bicycle and pedestrian paths, and central greens' as public lands, while 'community vineyards and orchards, and household commons' are common lands. This recognition of the diversity of non-private property, especially the legal distinction between public and common, is rare. While not an 'imperious' natural landscape, the constructed landscape of Village Homes has become one where, as Carol Rose predicts, people 'see' property and debate its implications.

The 'mapping' exercise is descriptive only, portraying in words the place and role of private, public and common lands in three chosen landscapes. In some literature, actual maps have been drawn; the original concept plan of Village Homes being the most expressive in terms of delineating the private, public

[268] Ibid, 144.
[269] Francis, above n256, 67.

and common estates.[270] Yet to 'map' the diverse property mosaic is to go beyond the two-dimensional, it requires the addition of nuanced overlays (such as trust 'ownership' of the Central Otago Rail Trail), as well capturing pictorially the complex interconnections between public, private and common lands that are a daily component of community life. Mapping the mosaic is also problematic where boundaries are designed to blur, or because use rights predominate. Yet despite its challenges, it is a future task worth pursuing. Efforts to pictorially represent the property mosaic in this thesis are left to the following part 6, and its photographic recording of diverse property *in situ*.

[270] Ibid x. Other examples include a map of traditional versus modern subdivision layouts in Lund, above n194, 304; or the map of ownerships in California's Cosumnes Valley conservation project in Fairfax et al, above n114, 247.

6. Picturing property diversity

Figure 1

Figure 2

Figure 1 The right to exclude is both dominant and domineering in private property discourse. The US Supreme Court says it is 'one of the most treasured strands in an owner's bundle of property rights'. Jerry Anderson says modern property has 'canonized' the right, placing it at the top of the judicial 'woodpile' without regard to context, community values or social norms. Its spectral monopolization has rendered other property types invisible, and produced Nicole Graham's monotonous 'lawscape' where ''standardised, universal and measurable space [is] grafted over place so that physicality and particularity of places became irrelevant.'

Figure 2 Carol Rose 'sees' abandoned fences as symbolic of private property's 'impermanence and pathos' and a refutation of its pretence of unchanging fixity. It is also symbolic of Theodore Steinberg's 'folly of owning nature.'

Figure 3

Figure 4

Figure 3 Southampton Common in the UK was an example of 'traditional common property.' Today it signifies the misunderstandings about the nature of property other than private property. Its open access as a park has effectively transformed it into public land.

Figure 4 The Clunes Common in NSW illustrates the transportability of traditional ideas of common property, where use rights of the land is restricted to members of the association in whom the common rights are vested. Public access to the grounds is however permitted, again indicating a blurring of property type at the edges.

Figures 5 and 6

Figure 5 In this image, Crown pastoral tenure in the NZ high country abuts public conservation land. The fence line to the right of the tramper's hut represents the boundary line. It also represents the powerful rhetorical force of the private right to exclude to devour other co-exisiting rights, effectively landlocking and precluding public access to the hut on the conservation estate.

Figure 6 The wet and dry sands of beaches signifiies the boundary line between private littoral lands and inherently public property under the US doctrine of the public trust. Public rights of access to such public lands across dry sands is problematic, and varies between jurisdictions.

Figure 7

Figure 8

Figure 7 This boundary fence separates two forms of public lands, one the conservation estate, and another encumbered by a private right to graze. The fence is practical (in keeping sheep enclosed) but also symbolic of the propensity of the private right to conflate and extinguish co-existing public property rights in the context of vast, empty landscapes, such as the NZ high country.

Figure 8 The rough hand-painted sign indicating the location of the 'public track' is misleading, as everything in this image is public property. The NZ bach located on coastal foreshore is a post-hoc sanctioned private right to use (valid on weekends and vacations). 'What we see is what we get', an image that suggests at first blush the typical intersection of public and private property. If we 'see' deeper, we get public foreshore, private rights to use, and unseen indigenous rights.

Figure 9

Figure 10

Figure 9 Opponents of coal seam gas (CSG) exploration seek to 'zip' up their lands, as this public art at Southern Cross University, NSW demonstrates. This art speaks to a certain desire to re-physicalize property rights in land, a defence against separable and abstract property sticks, such as the right to exploit divisible resources.

Figure 10 At The Channon Oval, NSW, residents 'stand on their patch', a rough scale drawing of local valleys, creeks and roads etched on the oval's turf, in a further protest against CSG. This image speaks again of people re-contextualsing their property rights to landed place. It also invokes ideas of Nicholas Blomley, of mapping property rights beyond the 'central logic', private as well as collective. Blomley sees property constantly made and performed, especially through contest, dissent and protest.

Figure 11

Figure 12

Figure 11 and 12 The Central Otago rail trail in NZ is a thin ribbon of public property that transects this rural region. It epitomizes the values and rationales of public property in land, the likes of a democratic sociability with strangers, recreation, and the human need for solitude. These foster Gregory Alexander's 'property as propriety', the forgotten half of the property dialectic, a capacity for public infrastructure to enhance well-lived civic lives.

Figure 13

Figure 14

Figure 13 The public domain in the western US is subject to private rights to graze under the Taylor Grazing Act of 1934, however public rights of recreational access are unaffected. Here signs speak of inclusion, not exclusion.

Figure 14 This public walking track in NZ (secured by the Queen's Chain) crosses over private farmland. Here exclusion and inclusion co-exist with compromises.

Figure 15

Figure 16

Figure 15 The sociability of public property in land is Carol Rose's 'comedy of the commons', sociable street scenes where' the more is the merrier'.

Figure 16 Again public property in land provides the physical and metaphorical space and infrastructure for egalitarianism, as these public handball courts in Los Angeles enact.

Figure 17

Figure 18

Figure 17 At The Sea Ranch, an ethos of 'living lightly off the land' saw property lines blur. The shared nature of the coastal landscape emphasizes co-existing uses, not exclusive dominion. Private housing rights adjoin communal use of meadows and community infrastructure…

Figure 18 Seeing property through Joseph Sax's 'economy of nature' blurs the significance of property lines. We see the land in between and across boundaries, not the markers that dissect it into atomized, disconnected parcels. Here empty landscapes such as the Central Otago in NZ are largely uncluttered with the indicia of (at least private) property.

Figure 19

Figure 20

Figure 19 and 20 Coastal landscapes are visually imperious ones, where property as Carol Rose explains, 'hits you in the eye.' Here the property mosaic is more apparent, with well-trodden grassed paths asserting public rights over what otherwise appears to be private land. Elsewhere the demarcation is more marked, by fences and properly constructed trails.

Figure 21

Figure 22

Figure 21 Private rights encroach readily on vulnerable public ones. Here a truck depot encroached onto abandoned rail tracks on the Central Otago Rail Trail in NZ. It took years for the Department of Conservation to rectify the unauthorized private trespass.

Figure 22 Signs in the middle of paddocks speak of the far from neat public/private divide. As Margaret Davies explains, there is ‘no bright line’.

Figure 23

Figure 23 Nicholas Blomley says the public sidewalk is a staunch and vigorous defender of the public estate. Here the sidewalk comes up against Georgette Poindexter's neatly manicured lawn, which she describes as a suburban 'idolization of the private realm' that eviscerates community and other collective values.

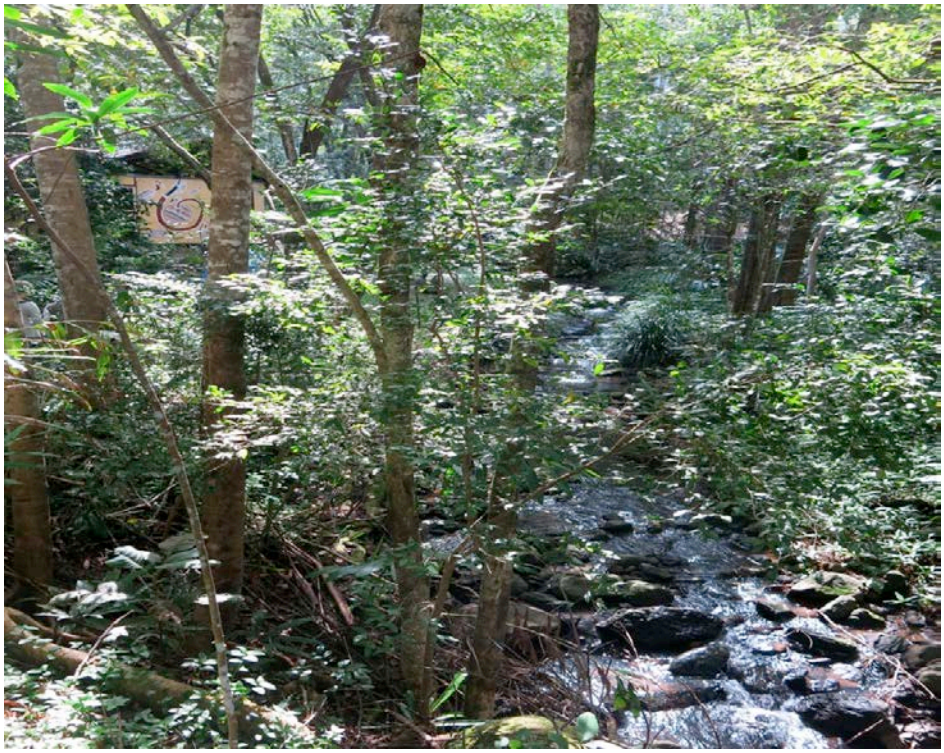

Figure 24.

Figure 25

Figure 24 and 25 Carol Rose says that the norms of common property include moderation and proportionality in the shared use of resources. Here an intentional community 'lives lightly off the land', performing acts of good land use, including rainforest re-vegetation, and micro-hydro power generation. Title to the property is held by a co-operative, with shareholdings conferring exclusive use within residential envelopes. All other lands are common lands, used for food growing, rainforest re-vegetation, and the running of a dairy herd. It exemplifies the outside private shell and inside common collective.

Figure 26

Figure 27

Figure 26 Anti-CSG (coal seam gas) protestors invoke William Blackstone's 'sole and despotic dominion' trope in 'locking the gate.'

Figure 27 This road sign talks of collective property being 'protected by community'. It has strong parallels to Nicholas Blomley's study of collective property claims in Vancouver's Downtown Eastside in *Unsettling the City Urban Land and the Politics of Property* (2004).

Figure 28

Figure 29

Figure 28 Rose says that property can be seen as picture, metaphor, narrative or illusion. Here a sand sculptor sees his 'private property' in his creative effort, seeking to exclude and to make income. His property rights are of course an illusion. Illusory property rights however can be less obvious, such as Kevin Gray's public 'rights' in private shopping malls.

Figure 29 Modern common property can be seen in the unlikeliest and most everyday of places. Here a ski lodge at Mt Hotham, Victoria operates on common property principles, as an outside private shell with inside communitarian use rights for a small community of lodge members.

Figures 30 and 31

Figure 30 Sue Farran's account of an 'extraordinary return to the land' describes new and evolving relationships between people and land. This phenomenon is 'seen' through a resurgence of interest in community gardens, orchards and allotments. Farran argues this 'return to the land' poses challenges to orthodox land law, with its innovative tenures (such as crop-shares and tree-leases) and its re-emphasis on the social and cultural values of property.

Figure 31 This sign at the Santa Monica Community Garden in California is interesting in its Lockean articulation of private property in a distinctly hybrid context. Private rights are asserted in a publicly accessible forum, but where use rights to garden and cultivate are restricted to eligible communal members.

7. Conclusion

This chapter canvasses the idea of diversity in property in land. It has identified both its defining characteristics and its constituent elements. It has sought out its telltale signs in the literature of sustainable communities, situated it to specific place, and enlivened its words with pictures. It now ends where it began, with Carol Rose's homespun tales about 'seeing', and the transformative power of imagination.

> There is an old adage, told of plain people and plain things: what you see is what you get. Property seems plain in this way too: what you see is what you get. With property, the nature of "things" imposes their own constraints. Yet even with those, what you see in property is what you and others have talked yourselves into about those "things"; and given some imagination, you may talk yourselves into seeing something else, with all the effects on understanding and action that a new "envisioning" may bring.[271]

For some centuries, we have talked ourselves into seeing a narrow picture of property in land. The limitations of this perspective, and its vexed consequences for land obligation and community are the subject of succeeding chapters. Perhaps a fresh burst of imagination; a new 'envisioning' of property in land may 'talk us into seeing something else.' As Charles Reich exhorted nearly 50 years ago in his unrealized call to action, it may be time to see and describe a 'new property'.

[271] Rose, above n6, 297.

Chapter 5 Land Obligation and Property Diversity

1. Introduction

To 'see' property patterns in human landscapes is to invoke a duality of perspective. One view is atomistic, an image of individual land parcels, and the distinct property lines that divide and fragment ownerships.[1] The other is holistic, the collective 'warp and woof'[2] of property type that weaves a pluralistic fabric across place. The atomistic view is premised on a private paradigm where 'standardized, universal and measurable space'[3] de-physicalizes place from context, and primacy is accorded to rights between persons about things.[4] By contrast, the holistic vision is intimately contextual and diverse, where rights, uses and claims to property inter-connect person to place. Into this conflicted 'seeing', where only the private half-truth of the dialectic prevails,[5] land obligation is an ideal adrift. Yet as James Karp explains, developing a land ethic is critical.

> Land is fundamentally different from other forms of property. Because any parcel of land is part of a network of natural systems extending beyond the boundaries described in the deed, it attains an importance superior to any individual landowner or to any period of time. Land is essential to our right of survival. Although a legally recognized landowner has extensive rights to use, to exclude and to convey land to others, those rights should be limited by a duty of land stewardship.[6]

This chapter argues that Karp's call for 'a duty of land stewardship' will go largely unheeded where property in land is *depicted* through the private lens,

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[1] 'Land parcels are discrete things, managed separately, and connected to one another only at the
edge.' Eric Freyfogle, 'Bounded People, Boundless Land' in Richard Knight & Peter Landres (eds.) *Stewardship Across Boundaries,* (1998) 17; Curt Meine, *Correction Lines: Essays on Land, Leopold, and Conservation* (2004) 202

[2] Aldo Leopold, *For the Health of the Land: Previously Unpublished Essays and Other Writings*,
J. Baird Callicott & Eric T. Freyfogle (eds.) (1999) 168

[3] Nicole Graham, *Lawscape Property Environment Law* (2010)

[4] Stuart Banner, *American Property A History of How, Why and What We Own* (2011) 101-6

[5] Cf Gregory Alexander, *Commodity & propriety Competing Visions in American Legal Thought 1776-1970* (1997)

[6] James Karp, 'A Private Property Duty of Stewardship: Changing our Land Ethic', (1993) 23 *Envtl. Law* 735.

a paradigm largely ill suited to generating concepts of obligation alongside right. It also describes how *property diversity* offers new ways to rethink the closed loop we seem stuck in. This chapter does not argue *why* we must change from the hegemonic view, but it does describe its failings, and conversely, the potentiality of a diverse reconceptualization.

Part 2 commences by observing that definitions of 'stewardship' or 'land obligation' are inevitably instrumental where property is monistic. The vexed place of obligation in modern property is then canvassed in part 3, whether in terms of property traditions, theories, or hierarchies. In Part 4, three institutional factors of modern property are identified that singly and cumulatively impede stewardship; *abstraction, commoditization, and individualism*. Part 5 concludes by examining landscapes where property diversity fosters an ownership 'suffused with moral content.'[7]

Eric Freyfogle says that property patterns matter because they create a 'framework for managing and using nature…they explain who gets to do what and where.'[8] Ultimately, which patterns we 'see' and their implications for 'who gets to do what and where' depend on which side of the duality prevails. This chapter considers how the implications of *property diversity* may resolve this dialectic tension.

2. Defining stewardship through the (private) property lens

Stewardship is a nebulous, ill-fitting concept in modern property. Richard Barnes describes it as having 'a long theoretical heritage, albeit an ambiguous and marginal one, which has struggled in the shadow of the stronger, pro-dominion approach to the control of resources.'[9] While often asserted as a duty,[10] its place in property's structure is unsettled, an issue explored in part 3. Many scholars aspire to a property right imbued with an environmental

[7] Eduardo Penalver, 'Land Virtues' (2009) 94 *Cornell LR* 876.
[8] Eric Freyfogle, *Agrarianism and the Good Society Land Culture Conflict and Hope* (2007) 107.
[9] Richard Barnes *Property Rights and Natural Resources* (2009) 155-6, Margaret Davies, *Property Meanings, histories, theories* (2007) 131.
[10] Karp ,above n6.

ethic.[11] But defining 'stewardship' through the private lens illustrates the unbridged gulf between aspiration and implementation. The result is that 'stewardship' is articulated as practical and outcomes measured, an essentially 'extra-property' construct.

Joseph Sax calls stewardship the law's 'awkward little secret,'[12] an inconvenient truth about property's problematic relationship with place. Margaret Davies explains the orthodoxy, and its counterpoint.

> Property is not an object at all, but rather a legally defined relationship between persons with respect to an object. 'Property' is only an effect, a construction, of relationships between people, meaning that its objective character is contestable. Alternative constructions of property, such as the notion of stewardship, may challenge the subject-object and person-property distinctions.[13]

Its 'awkwardness' is also explicable when various property law rules allude to, or have a passing resonance of, ownership obligation. These chimeric 'sightings' encourage optimistic claims, Eric Freyfogle's assertion that property law and ecology are kindred disciplines,[14] or Alyson Flourney's comment that the 'clearest lens on society's environmental ethic is the common law of property… a logical starting point.'[15]

But what are these steward-like doctrines that constitute Flourney's 'logical starting point'? Property rules have long accommodated fragmented beneficial ownership, that idea that land ownership is a 'trust with attendant

[11] Rose, above n46; Alyson Flournoy,, 'In Search of an Environmental Ethic', (2003) 28 *Colum. J. Envtl. Law* 63.
[12] Joseph Sax, *Playing Darts with a Rembrandt Public and Private Rights in Cultural Treasures* (1999) 59.
[13] Davies, above n9, 13-4.
[14] 'Ecology explains how activities on one land parcel cab affect landowners and land uses elsewhere, [while] property law then evaluates these spillover effects.' Freyfogle, above n8, 107-108.
[15] Flournoy, above n11, 98.

obligations.'[16] However, legal history tends to attribute the evolution of the *use* to selfish rather than altruistic aims, the avoidance of feudal dues, or the preservation of dynastic privilege. Less typically was the use employed for 'some greater scheme … religious, ethical, or ecological.'[17] Likewise, rules such as waste or the rule against perpetuities, purport to protect the interests of future unborn owners, thus suggesting a concern for inter-generational consequence. Yet waste is not a generalized mandate to 'live lightly off the land',[18] but a blunt safeguard against deliberate damage to a remainderman's capital improvements. [19] In part 3, other examples are given, such as the prohibition on implied profits a prendre, or the good husbandry rules of agricultural tenancy. Yet collectively these principles lack any overarching guiding principle, more *ad hoc* than doctrinally consistent. It seems that property obligation stalls amidst a paucity of corroboration.

At the conceptual level, Joseph Singer's description of the 'castle' model of land ownership is one that makes adverse externalities 'magically vanish.'[20] The 'castle' reinforces the boundaries of dominion, and the illusion that trans-boundary spillovers are hermetically contained. Its dominance obviates the urgency of any need for right to be tempered by obligation. Its effect is seen in the historical record. 'Private owners are … not good stewards: their perspectives are too short, they ignore ecological ripple effects, and their isolated decisions can produce chaotic land-use patterns.'[21]

Ultimately, stewardship literature is compelled to jettison property's unfulfilled beginnings, and define stewardship in purely instrumental terms, self-evident truths about why 'land remains productive, fertile, and biologically diverse'.

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[16] Lynton Caldwell, "Rights of Ownership or Rights of Use? The Need for a New Conceptual Basis for Land Use Policy" (1974) 15 *Wm. & Mary LR* 759, 766; Richard Brewer, *Conservancy The Land Trust Movement in America* (2003) 115.
[17] Brewer above n, 16.
[18] Eric Freyfogle, *Why Conservation is Failing and How it Can Regain Ground* (2006) 149; Caldwell, above n,16, 766.
[19] Purdy argues that the adaptation of English waste doctrine to the American landscape stressed progress and economic expansion, such that '[i]t would be an outrage on common sense to call enhancement (the clearance of native forests) waste.' Jedediah Purdy, *The Meaning of Property Freedom, Community, and the Legal Imagination* (2010) 61.
[20] Joseph Singer, *Entitlement: The Paradoxes of Property* (2000).
[21] Freyfogle, above n8, 99. This ripple effect renders retreat into public land 'enclaves' futile.

> Is the soil kept fertile and in place? Are waterways clean and full of life? Are tracts of land devoted to uses for which they are ecologically well suited? Are landscapes sensibly laid out and pleasing to the eye and the ear? And are the modes of living and working on land likely to endure for centuries, without nature lashing back? [22]

William Lucy and Catherine Mitchell concur:'[s]tewardship is not a substantive moral doctrine in itself but an instrumental concept… a practical mechanism."[23] Despite its intuitive potential, stewardship remains property's awkward and ill-defined 'secret' because, by and large, our dominant 'seeing' of the private ownership modality keeps it so.

3. Locating stewardship in property traditions, theories, and structure

Laura Underkuffler reasons that '[p]roperty is a zero-sum game in the context of finite resources.'[24] Win-lose becomes self-perpetuating, pitting property against the environment in an inexorable contest of futility. Re-calibrating this 'game' requires either finding a viable place for obligation in property, or a fundamental re-conceptualization of property in land. This part 3 pursues the former. First, it seeks out the available evidence of stewardship within existing property traditions. Second, it canvasses those legal theories that are sympathetic to property obligation. Third, it engages directly with institutional issues of structure. Despite some limited scope for developing stewardship within existing frameworks, this part concludes that in the main Underkuffler is depressingly right.

[22] Ibid, 18.
[23] William Lucy & Catherine Mitchell, 'Replacing Private Property: The Case for Stewardship' (1996) 55(3) *CLJ* 566, 596, 599.
[24] Laura Underkuffler, 'Property as Constitutional Myth: Utilities and Dangers' (2006) 92 *Cornell LR* 1239, 1247.

3.1 Stewardship and property traditions

Common law[25] ideas of property obligation subsist largely on the 'edge of the field,'[26] peripheral to its mainstream concerns. 'Limits on property rights are the exception, not the rule, the periphery rather than the core.'[27] By contrast, 'caring for country' is an elemental tenet of indigenous laws and customs. In settler societies, cultural perspective strongly influences the importance and role of obligation within property discourse.

The feudal nature of the Anglo common law[28] and its attendant doctrines of tenure and estates, speak faintly of obligation as an historic consequence of ownership.[29] Although the *Statute of Tenures* rationalized feudal incidents, the 'ghost' of feudalism[30] was not fully exorcised, and principles that reinforced estate holder obligation to the Crown, such as escheat[31] or quit rents,[32] persist to limited extents, or are imitated by like ideas.[33] Other property rules concerned with obligation also remain as isolated exemplars. The doctrine of waste precludes harmful activities by life tenants that permanently alter land for future reversioners or remaindermen,[34] riparian right is premised on obligations owed to downstream owners, profits a prendre cannot be implied or prescribed because of their extractive nature,[35] and agricultural tenancy laws are fashioned on concepts of good husbandry. Yet collating these principles into the one sentence is confected, falsely

[25] The focus on common law jurisdictions overlooks other legal traditions, for example Donna McKenzie Skene et al, 'Stewardship: From Rhetoric to Reality' (1999) 3 *Edinburgh LR* 151, 155.
[26] Joseph Singer, *The Edges of the Field: Lessons on Obligations of Ownership* (2000).
[27] Gregory Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94 *Cornell LR* 745.
[28] While modern legislation may facilitate stewardship (such as the registration of voluntary conservation covenants), the statutory paradigm is primarily concerned with environmental regulation rather than property obligation.
[29] Fred Bosselmann, 'Four Land Ethics: Order, Reform, Responsibility; Opportunity', (1994) 24 *Envtl. Law* 1439.

[30] Andrew Buck, *The Making of Australian Property Law* (2006).
[31] Escheat remains in Western Australia.
[32] Quit rents were common until the mid 19th century, Buck, above n30.
[33] Modern analogies of quit rents include state land taxes.
[34] Murray Raff, 'Environmental Obligations and the Western Liberal Property Concept', (1998) 22 *Melb. Univ. Law Rev.* 657; Purdy, above n19.
[35] David Bederman, "The Curious Resurrection of Custom: Beach Access and Judicial Takings", (1996) 96 *Columbia Law Rev.* 1375, at 1406-1407.

conflating the common law's concern for future consequence. Nearly all are 'marginal outliers.'[36] As James Karp notes

> It is comforting for those trained in the law to tie any new idea or perspective neatly to the past or to existing rules. Thus, equating the duty of stewardship to the duty to prevent waste and the law of nuisance is a bow to that important tradition. But stewardship means more. It demands that we abandon the strict economic approach to land-use decision-making that entails broad privileges and few obligations. Stewardship requires a respect for the relationship between humans and the land that receives little attention in our [Anglo-American] law.[37]

By contrast, indigenous laws and customs are intimately attentive to the relationship between humans and the land. Bonds between people are place are familial, physical, cultural and spiritual, indicating a 'different construction of the idea of property and ownership,[38] a construct where 'the role of humans [is] part of an interrelated living whole.'[39] Nin Thomas asserts that Maori land values 'provide a bedrock of duties owed to the environment', while western law 'effectively dispenses with one of the Maori's three essential worlds, ultimate reality…or at least marginalize it into being irrelevant to legal reasoning.'[40] Inherent to this worldview is continuity, oral traditions that place responsibility to protect and preserve for '[in the case of the Haudenosauness nation] seven generations to come.'[41]

Hugh Brody's anthropological study of the Inuit peoples of northern Canada in the 1970s observes the settled nature of their relationship with land, and concludes that contrary to the stereotype, western attitudes to land are more nomadic than the simple hunter-gatherer's. Westerners experience 'the lure of opportunity… moving on, making progress, wondering if we might prosper

[36] Raff , above n34, 690.
[37] Karp, above n6, 749.
[38] Nicole Graham, 'Owning the Earth' in *Exploring Wild Law* (P. Burdon ed., 2011) 263.
[39] Nin Thomas, 'Maori Concepts of Ranga tiratanga, Kaitiakitanga, the Environment, and Property Rights' in David Grinlinton & Prue Taylor (eds.) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges*, (2011) 220, 226.
[40] Ibid, 226.
[41] J Ronald Engel, 'Property: Faustian Pact or New Covenant with Earth?' in Grinlinton & Taylor, above n39, 75.

there rather than here,' our mobility being 'the source of energetic colonial power.'[42] By contrast, the Inuit's worldview did not extend beyond their home; they had to manage the 'complicated business of maintaining the world around them to ensure that its produce is bountiful.' Central to this imperative was the maintenance of the natural world. 'The assumption held deep within this point of view is the place where a people lives is ideal: therefore change is for the worse.'[43] Brody's thesis places stewardship at the heart of the indigenous relationship with land, an imperative to conserve the only earthly Eden known.

Indigenous land laws are also knowledge-based and localized, informed by the capacities and limits of the lands over which they apply.[44] Conversely, as Nicole Graham observes, modern property rights exist independently of their location. 'Modern property law conceptualizes and articulates limits to its application in terms of jurisdiction and authority. Yet this authority and jurisdiction derives not from the specific physical conditions of local places, but from itself in a circuitous and irrational fashion.'[45] Ownership, responsibility, and knowledge are all inter-connected in the indigenous mindset, a self-correcting propensity to sustain land usage within geographic, climatic, and temporal limits.

The risk in idealizing indigenous land law's contribution to land stewardship is one of hyperbolic over-reach. Carol Rose argues that indigenous people's management of natural resources is extensive and their practices have 'contributed to numerous species' extinction in prehistoric as well as more recent times.'[46] Tellingly, Rose argues that indigenous perspectives have less to offer a modern property ethic than superficially appears. Her reasoning is twofold, first they are premised on environmental bounty rather than scarcity, and second their norms focus on human humility, rather than the immediate

[42] Hugh Brody, *The Other Side of Eden* (2000) 101.
[43] Ibid, 117.
[44] An analogy is pre-enclosure English common rights, many of which were specific to locality' Graham, above n3.
[45] Graham, above n3, 267.
[46] Carol Rose, 'Given-ness and Gift: Property and the Quest for Environmental Ethics', (1994) *Envtl. Law* 1.

task of addressing destructive human behavior.[47] Despite Rose's cautionary note, indigenous perspectives underline the significance of property pluralism, and the broadening effects such diversity has on the meagre offerings of the common law.

3.2 Stewardship and property theory

If property doctrine (outside indigenous law) is a barren place for stewardship, to what extent can it flourish in more fertile theoretical soil? Again, the answer falls mainly to the edges, restricted to theories concerned with personal identity, or social or communitarian values, and less applicable to mainstream law and economics analyses of property.

Margaret Radin's personhood theory is a 'long-ignored' [48] intuitive property theory that 'focuses on personal embodiment or self-constitution in terms of things.'[49] Identity or embodiment of self becomes bound up with certain types of property. Radin distinguishes between *personal* and *fungible property*, and uses loss as a means to define each.[50] Radin's personhood theory is useful in explaining the motives of stewardship. For example, Courtney White's study of the environmental ethics of ranchers in the American west identifies personal fulfillment as a key driver in a changing paradigm. White quotes one rancher

> Ranchers have become applied ecologists…nowadays its all about stewardship, not food and fiber. But its also having a passion about what you are doing…like many, I'm grateful for the privilege of being allowed to take care of a little piece of the planet for whatever short amount of time we have.[51]

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[47] Ibid, 14-19; Stone likewise queries the "vaunted harmony between American Plains Indians and Nature'. Christopher Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' (1972) *S. Cal. L. Rev.* 450.
[48] 'Property helps to define me and you within the liberal cultural context', Davies, above n9, 13.
[49] Margaret Radin, 'Property and Personhood', (1982) 34 *Stanford Law Rev*. 957, 958.
[50] Ibid, 960.
[51] Courtney White, *Revolution on the Range: The Rise of the New Ranch in the American West* (2008) 48.

Such relationships surpass purely commercial or economic rationales. Rather the property becomes in Radin's words 'affirmatively part of oneself… a scene of one's history and future, one's life and growth, an embodiment of personal autonomy.'[52] The difficulty with personhood theory lies in drawing the line between personal and fungible property.[53] Radin acknowledges that the dichotomy is in truth a continuum,[54] one where stewardship values are closer to the personal end of the spectrum. Personhood also inspired a related theory of 'peoplehood' to explain group ownership of cultural property. Peoplehood 'draws upon … themes of custody, care, and trusteeship, rather than comparably more fungible conceptions of property, '[55] a principle that includes both rights and obligations independent of traditional title that 'lies at the heart of cultural stewardship.'[56]

The links between property and stewardship are explicitly articulated in progressive property theory.[57] Progressive scholars challenge the 'near hegemony of law and economics analyses of property'[58] and seek to 'distinguish between dominant conceptions of property, and [their] underlying realities.'[59] Progressive theorists say the former is 'inadequate as the sole basis for resolving property conflicts or for designing property institutions.' Rather one must look to 'the underlying human values that property serves and the social relationships it shapes and protects.'[60] Such values are pluralistic; and include environmental stewardship, where 'attentiveness to the effects of …exercising property rights on others, including future generations, and on the natural environment, and the non-human world' is critical.[61]

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[52] Ibid, 992
[53] Penalver explores the blurred distinction between fungible and personal in terms of the family home, Penalver above n9.
[54] Ibid, 986.
[55] Kristin Carpenter et al, 'In Defense of Property' (2009) 118 *Yale LJ* 1022, 1067.
[56] Ibid.
[57] Gregory Alexander et al, "A Statement of Progressive Property" (2009) 94 *Cornell LR* 743.
[58] Alexander, above n27; Penalver, above n7; Joseph Singer, "Democratic Estates: Property Law in a Free and Democratic Society" 94 *Cornell LR* 1009, 1036.
[59] Nicholas Blomley, 'Performing property, making the world' at http://ssrn.com/abstract=2053656.
[60] Alexander et al, above n57, 743
[61] Ibid, 744.

Amongst its proponents, Eduardo Penalver is prominent for his advocacy of the virtues of land ownership. Penalver sees human flourishing[62] enhanced by a long neglected 'virtue theory of property',[63] specifically *industry, justice*, and *humility.* Humility is especially significant to land ethics; it requires a landowner, uncertain of the future consequences of their actions, to be guided by precaution and an intergenerational view of ownership. Humility is integral given the finitude of land, the inertia of land memory, and the adverse path dependence this engenders.[64] In other words, human changes made to land have long-lasting, often irreversible effects that compound and mutually reinforce each other.

> The notion that land has a memory that stretches the impact of our current choices far into the future suggests an enormous responsibility on the part of those who make decisions about how to use it.[65]

Within dominant law and economics analyses of property, stewardship may be justified if it is sufficiently efficient or welfare maximizing. Harold Demsetz's seminal analysis that property rights arise 'when it becomes economic for those affected by externalities to internalize benefits and costs'[66] may explain why it is economic in some circumstances for a private landowner to efficiently use scarce resources in a steward-like way. Moreover, law and economics theories invest heavily in the primacy of the *private* owner being best placed to 'take into account … competing claims of the present and the future.'[67] Private ownership creates incentives to use land wisely in response to market signals about the scarcity or value of the land's resources.[68] But such perspectives fail to explain why land may equally 'facilitate the direct enjoyment of non-fungible and often social human goods [that] overshadow

[62] Human flourishing is 'the obligation to support and nurture the social structures necessary for development of human capabilities', Gregory Alexander & Eduardo Penalver, *An Introduction to Property Theory* (2012) 95-6.
[63] Virtues are 'acquired, stable dispositions to engage in characteristic modes of behavior conducive to human flourishing', Penalver above n7, 876
[64] Ibid, 831.
[65] Ibid, 884.
[66] Harold Demsetz,"Toward a Theory of Property Rights", (1967) 57 *Am. Econ. Rev.* 347, 354.
[67] Ibid, 355.
[68] Penalver, above n7, 826.

the motivating force of its investment value.'[69] It also does not counter the alternative and equally logical conclusion that it may be more efficient in some circumstances for a private landowner to adopt the most destructive land use available.

The capacity of modern property to generate obligation as well as right is not a mainstream concern of liberal property theory or doctrine. Its outlier status is symptomatic of a wider systemic issue; is it possible to coherently locate stewardship within the structure of property, and if so, where? At a threshold level, the question posed is one of inherency; is land obligation inherent or autonomous to property? And if the former, the question becomes one of type: is stewardship a duty, a right, a rule, a qualification, or something else?[70] The remainder of part 3 canvasses the many divergent responses to these questions.

3.3 Stewardship and property's Structure – is stewardship internal to, or external of property?

The case for obligation to be a 'thing' internal to property is heavily reliant on the assumption that property as a human institution is inherently social and relational. For example, Joseph Singer prefers a socially situated concept of property, the variously termed 'good neighbor', 'environmental' or 'citizenship'[71] model, where rights and other-regarding obligations[72] are 'deeply entwined in ownership, a 'reality' that the dominant 'castle' conception masks.

> The citizenship model starts from an assumption that obligations are inherent in ownership. … Obligation is inherent in liberalism, but the castle and market

[69] Ibid, 832.
[70] 'When we gather together to make rules for our shared landscapes, we exercise one of our most important, positive *liberties*.' Eric Freyfogle, *Why Conservation is Failing and How it Can Regain Ground* (2006) 193. Richard Brewer sees stewardship as a modern extension of the discourse of improvement, Brewer, above n16, 118-9.
[71] Joseph Singer, 'The Ownership Society and Takings of Property: Castles, Investments and Just Obligations' (2006) 30 *Harv. Envtl. L. Rev.* 309, 329.
[72] Joseph Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* (2011) 20.

> models marginalize it. They seek to suppress consciousness of the obligations inherent in ownership, to draw our attention away from them.[73]

In a similar vein, Gregory Alexander identifies a social-obligation norm inherent to Anglo-American law that has 'never been explicitly recognized … or systemically developed.'[74] Alexander's logic is parallel to Singer's.

> More generally, property owners owe far more responsibilities to others, both owners and non-owners, than the conventional imagery of property rights suggests. Property rights are inherently relational; because of this characteristic, owners necessarily owe obligations to others.[75]

While the social-obligation norm is primarily *social,* with its concern for human flourishing, well-lived lives, and a civic culture, it also has environmental implication.

> Because human flourishing depends on social structures, the communities to which property owners belong may legitimately make demands of them to contribute out of their resources or to share their property in order to sustain those social matrices. Similar arguments… can justify that individuals' use of their property [is] made in ways that do not permanently harm the environment.[76]

Others draw inherency from comparative study. Murray Raff examines obligation in civilian traditions (particularly German property law) to assert that an environmental obligation in property is 'implicit and too frequently overlooked.'[77] It is 'an aspect of property itself…. at the deepest

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[73] Singer, above n71, 329-330.
[74] Alexander, above n27.
[75] Ibid,, 747-8.
[76] Alexander & Penalver, above n62, 95-6. Obligation may also be also owed to future generations in cases of life-traversing projects, Gregory Alexander, 'Unborn Communities' (2013) Cornell Law School research paper No. 13-83.
[77] Raff, above n34, 658. McHarg concludes it is axiomatic that "property rights…are regarded as necessarily carrying with them obligations of a social nature,', arguing that property's relational nature is the *source* of external legislative regulation. Aileen McHarg, "The Social Obligations of Ownership and the Regulation of Energy Utilities in the UK and the EU" in A. McHarg et al, (eds.) *Property and the Law in Energy and Natural Resources* (2009) 360, 361-2.

jurisprudential level.'[78] Raff does not require any Hohfeldian correlative to offset the whereabouts or existence of duty, '[s]ocial and individual obligations…lie within the very essence of property… without judicial presupposition of a basic right to do anything with it.'[79]

Yet despite such claims of inherent 'obviousness', obligation remains stubbornly peripheral to common law property discourse. Thus, Alexander calls his social-obligation norm 'grossly underrated', and Singer's citizenship model remains aspirational. Indeed, Nick Blomley suggests that Singer would be better engaged asking why the *practice* of the castle model is so successful, rather than fruitlessly trying to impugn its clearly dominant values. [80] The premise that individuals owe obligations to others because we live in social communities is lost on the mainstream rational actor.

The counterpoint position is that stewardship is an anathema to property, and must by definition stand outside of it. This autonomous view, articulated by William Lucy and Catherine Mitchell,[81] dismisses the norms and practices of private property as dysfunctional and normatively objectionable, a form of 'useless currency'. Conceptual incompatibility means that stewardship must be a replacement for private property, not simply an adjunct to it. 'It is not feasible to claim the most extensive rights of exclusion, control and alienation over a resource, and yet be subject to a vast range of duties in relation to that resource for the benefit of other persons…. A steward does not enjoy the extensive trinity of rights characteristic of private property.'[82]

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[78] Raff, above n34, 691.
[79] Ibid.
[80] Blomley suggests that Singer would be better engaged asking why the practice of the castle model is so successful, rather than fruitlessly trying to impugn its values, Blomley, above n39.
[81] Lucy & Mitchell, above n23.
[82] Ibid, 586. Lucy and Mitchell scrutinize common property as an alternative model for land custodianship, but find it wanting, chiefly on tragedy grounds, Ibid, 600. Indigenous claims to 'cultural property' are likewise 'better explained and justified through a stewardship model' rather than an ownership model. Stewardship tends to fall outside the paradigms of individuality and alienability upon which classic property law is premised.' Carpenter et al, above n55, 1028-9.

Likewise, scholars who recognize that obligation is a self-imposed moral or ethical restraint acknowledge that it is a duty 'outside of the law.' [83] As Carol Rose simply observes, if we are to have 'environmental good things… we need to exercise some self-restraint.'[84] Or if not 'outside of the law', then stewardship is the responsibility of a discipline 'outside' property law. As Klaus Bosselmann argues, '[d]eveloping a property regime with inherent responsibilities is the purpose of *environmental law*.'[85]

If obligation is 'inside' the institution of property, its case for inherency is either worn thin by its ceaseless circularity, or is simply over-reliant on assertion. This fragility is underscored when this chapter next examines the unsettled place of obligation within property's formal structures.

3.4 Stewardship and property's structure - duty, right or rule?

At the taxonomic level, what form should stewardship take? Logically, a steward is a duty-bearer.[86] Aldo Leopold talks of 'a positive duty that society might rightly impose on landowners.'[87] Richard Barnes similarly describes a steward as an owner subject to overriding duties, obligations that reflect the 'high degree of interest a community has in a particular resource.'[88]

> Distilling the literature on stewardship reveals two key features; the duty to conserve and the duty to preserve. These duties have a profound effect on two particular incidents, the right to the capital (which includes the right to exclude) and the prohibition on harmful use.[89]

[83] 'The stewardship tradition is obviously powerful and deeply rooted, and impressively it grows out of self-imposed restraint, not as a duty imposed by law or even the strictures of public opinion.' Sax, above n12, 72.
[84] Rose, "above n46, 100.
[85] 'Environmental law is failing because it still only floats over the surface of property law. It creates a body of second order legal principles, which reflect a second-order legal interest…. Seen in these terms, it could be said that environmental law has not adequately penetrated the content of property law.' Grinlinton & Taylor above n39, 12.
[86] Karp, above n6, 748.
[87] Leopold, above n2, 193.
[88] Barnes, above n9, 52.
[89] Ibid, 157.

Barnes' linkage of duty to property's *incidents* reflects an analysis attributed to American jurist Wesley Hohfield. Hohfield's 'main contribution to legal theory was to identify and name eight building blocks…from which all legal relationships could be built.'[90] The Hohfeldian analysis of right, duty, privilege, no-right, power, liability, immunity and disability, was designed to promote rigor in legal thinking.[91] While it may be a 'hocus pocus [that] never caught on',[92] Hohfield does help in 'thinking straight'[93] about stewardship's place in property's structure. His linkage of right and duty affirms the capacity of property to generate duties, and exposes the fixation on property as merely a source of 'rights'.

Hohfield's building blocks work in two ways, as jural opposites and jural correlatives. *Duty* is the jural opposite of *privilege*, and the jural correlative of *right*. Importantly, the latter pairing requires that a duty will only subsist as a consequence of a strictly defined right. Hohfield criticizes the indiscriminate use of the term 'right', arguing that it frequently misdescribes a multitude of contexts, including mere privilege. Hohfeldian right is properly ascribed to that which is solely a legally enforceable claim.[94] Hence a duty of stewardship requires a parallel and strictly defined property right. Eric Freyfogle implies that stewardship is a consequence of the right to use,[95] '[w]e should embrace a notion that landowners are stewards, with clear rights to use but only limited rights to degrade and consume.'[96]

Moreover duty may be positive, 'an affirmative duty to preserve'[97], or negative, a duty to refrain from doing harm. Such duality reflects the

[90] Banner, above n4, 102-3.
[91] Cf imprecision that 'all too often [leads to a] corresponding paucity and confusion as regards actual legal conceptions', Wesley Hohfield 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) *Yale LJ* 16, 29.
[92] Banner, above n4, 104.
[93] Hohfield, above n91, 18; J. Hamilton & N. Bankes, 'Different Views of the Cathedral: The Literature on Property Law Theory' in *Property and the Law in Energy and Natural Resources,* 19-20 (A. McHarg et al eds, 2010). 24-5.
[94] Hohfield, above n91, 32.
[95] Honore listed the "right to use" second in his incidents of property, A M Honore, 'Ownership" in A G Guest (ed.) *Oxford Essays in Jurisprudence* (1961).
[96] Eric Freyfogle, *On Private Property Finding Common Ground on the Ownership of Land* (2007) 141.
[97] Sax, above n12, 57-8.

preservation versus conservation tension in stewardship discourse. In practice, a steward's duty is invariably positive as well as negative, conforming to Hohfield's explanation of duty as 'that which one ought or ought not to do.'[98]

To whom the duty is owed is likewise open-ended. It may be immediate: to neighbors, the local community; or more widely to society,[99] the environment, or the Earth itself. James Karp is not exclusive in this respect.

> We owe a duty of responsibility to ourselves, to our community, to other members of other communities on the planet, and the generations to follow.[100]

To others, stewardship is not articulated as a duty *per se,* but the result of a qualified right. Proponents of cultural property[101] for example argue that stewardship arises as a limitation on the right to dispose. In other words, rather than being a reciprocal consequence of a right as Hohfield pre-supposes, stewardship is the consequence of a diminished right. Joseph Sax explains that '[i]ndisputably, any such imposition takes something away from the owner, but it does not intrude markedly on the [owner's] core interests.'[102] The owner of a Rembrandt painting,[103] much like the private owner of a biodiversity hotspot, is not denied rights to alienate, exclude, or reap economic benefit; yet there is no right to destroy, to 'throw darts at the masterpiece' that is implicit in the rights of ownership. This view is analogous

[98] Hohfield, above n91, 32.
[99] John Cribbet, 'Concepts in Transition: The Search for a New Definition of Property" (1986) *U. Ill. L. Rev.* 1, 40.
[100] Karp, above n6, 752; Stewardship is 'a duty that we all bear toward creation [that] has shaped our environmental law since the first Earth Day'. J. Peter Byrne, 'Property and Environment: Thoughts on an Evolving Relationship', (2004-2005) 28 *Harv. J.L. & Pub. Pol'y* 679 688.
[101] Laura Underkuffler, *The Idea of Property: Its Meaning and Power* (2003), 110; John Merryman 'The Refrigerator of Bernard Buffet' (1976) 27 *Hastings LJ* 1023, 1041; John Mousstakis 'Group Rights in Cultural Property (1989) 74 Cornell LR 1179; John Merryman, 'The Public Interest in Cultural Property' (1989) 7 *California Law Review* 339.
[102] Sax, above n12, 68.
[103] Ibid.

to a conception of private ownership subject to the encumbrance of social[104] or public[105] interests.

Stewardship may also be articulated as a right, a *public* right to land health. Here the prism through which stewardship is viewed becomes a public, not a private one. As a result, esoteric debates about the parallel qualities of the private right, or the extent of its impairment, are subsumed by its wider focus. In this paradigm, rights are pluralistic and relative, however scholars concede that presently public rights can be untidy.[106] Alison Rieser wistfully observes that 'a right to expect … lands and natural areas to retain their natural characteristics' is a public property right in search of a theory.[107] David Farrier's ambition for a 'collective property right to biological diversity'[108] is worthy, but lacks practicality, with 'the scantest of toeholds in rural landowner communities.'[109]

Finally, stewardship may be categorized as a *rule*. Christopher Rodgers' 'resource allocation model' of property accounts for positive stewardship obligations as *property management rules.*[110] Property management rules 'prosecute a public interest objective - nature conservation' by 'controlling the terms on which access to the resource (land) is permitted.'[111] Such positive management obligations, whether imposed by statute or contract, cannot be explained by 'extant property rights scholarship.'[112] Rather, a fourth category of *rule* is needed to capture the substance of stewardship, an addition to

[104] Victor Yannacone, 'Property and Stewardship: Private Property Plus Public Interest Equals Social Property' (1978) 23 *South Dakota L. Rev.* 71.
[105] Richard Babcock & Duane Feurer, 'Land as a Commodity "Affected with a Public Interest"', 52 *Wash. L. Rev.* 289 (1976-1977).
[106] Rose, above n46, 19-25.
[107] Alison Rieser, 'Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory' (1991) 15 *Harvard Envtl. L. Rev.* 393, 393.
[108] David Farrier, 'Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?' (1995) 19 *Harv. Envtl. L. Rev.* 303.
[109] Christopher Elmendorf, Ideas, 'Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective', *U. Ill. L. Rev.* (2003), 423, 456.
[110] Christopher Rodgers, 'Nature's Place? Property Rights, Property Rules and Environmental Stewardship', (2009) 68(3) *Cambridge Law Journal* 550, 557.
[111] Ibid, 570.
[112] Ibid, 569.

Guido Calabresi and Douglas Melamed's seminal rule hierarchy of *property rules, liability rules*, and *entitlements protected by inalienability rules*.[113]

The taxonomic smorgasbord that is duty, right, rule or qualification, fulfills Hohfield's prophecy of imprecise terminology fostering a 'paucity and confusion as regards actual legal conceptions.'[114] Such imprecision reflects a lack of vantage, the objective altitude necessary to gain perspective on stewardship's place and role in property. Presently, the climb to that vantage point is strewn with obstacles, the litter of recent iterations of property. Part 4 leaves structure aside, and inspects the content of that paradigmatic litter.

4. The impediments to stewardship

While stewardship may flourish in small, isolated outcrops, in the main it lies fallow on the unforgiving terrain of a liberal conception of property in land, a 'legal-economic ordering' where property is 'unitary, systemized and centralized.'[115] Joseph Sax says that this liberal paradigm embraces two basic ideas, neither of which accommodates stewardship. One is political, based on individual autonomy and privacy, the other economic, based on the right to the product of one's labor and effort.[116] Its ascendancy dates back to (at least) the enclosure period of the 18th and 19th centuries. Nicholas Blomley traces its genesis to early 17th century jurist Edward Coke, and his project of transforming the common law from a 'variegated and diverse system of localized practices [into] a disembodied superstructure.'[117]

In recent decades, its pre-eminence appears less assured, amidst a gathering sense that the paradigm is approaching a tipping point. Nicole Graham adopts Thomas Kuhn's theory of paradigm shift to situate our present predicament. Kuhn describes paradigms as 'the result of an accumulation of knowledge that

[113] Guido Calabresi & A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 *Harv. L. Rev.* 1089.
[114] Hohfield, above n91, 29.
[115] Nicholas Blomley, *Law, Space and the Geographies of Power* (1994) 68-82.
[116] Joseph Sax, *Ownership, Property and Sustainability 2010 Wallace Stegner Lecture* (2010) 4.
[117] Blomley, above n115, 76.

works in its specific time and place… [a] successful cultural adaptation to particular conditions.' [118] These social and ecological relationships are not universal truths about inexorable human progress, but simply 'true in a given time and place under a set of particular conditions.'[119] Paradigms endure where 'on ideological and practical levels they continue to make sense of the world.'[120] Paradigm *shifts* occur when the prevailing body of knowledge is no longer temporally or geographically appropriate. Institutional mal-adaption is a dawning realization that 'not only are other ideas or frameworks of meaning …more plausible than the current paradigm, but also… they seem more viable.'[121] Graham argues that in the case of property, the liberal paradigm is dysfunctional and approaching crisis. In ex-settler societies especially, far from the historicized context of the English enclosure period, it lacks plausibility.[122]

This part 4 argues that *abstraction, individualism* and a *'land as commodity'* mentality remain formidable impediments to the development of a land ethic. When viewed through the narrow private paradigm, they conceal the 'crisis' that Graham foresees, and diminish the sense that we are at the cusp of a Kuhn-like shift. Whether their hegemony remains so definitive when the perspective changes, is another question postponed to part 5.

4.1 The primacy of individualism

Where property is universalized as a private and individual right, its relational attributes fade to near invisibility. Property becomes an individual entitlement in a contextual vacuum.[123] The private property rights movement, especially influential in the United States, exemplifies its one-sided excess.[124]

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[118] Graham, above n3, 2.
[119] Ibid, 2.
[120] Ibid, 203.
[121] Ibid.
[122] 'The dispossession and diaspora of the English regime of private property extended across the globe via colonization.' Ibid, 204.
[123] Aldo Leopold warned of a "bogus individualism" rather than responsible citizenship. Meine, above n1.
[124] Cribbet, above n99, 42; Nancie Marzulla, 'Property Rights Movement: How it Began and Where it is Headed' in N Blomley et al (eds.) *The Legal Geographies Reader* (2001).

However, such a skewed view represents a fundamental mis-reading of property. Scholars have written at length on the duality of property. Gregory Alexander describes it in terms of 'property as commodity, and property as propriety'.[125] Laura Underkuffler speaks of competing 'comprehensive' and 'absolute' approaches.[126] Eric Freyfogle identifies a cultural fault line, where abstract reasoning and individualism faces off 'particularity, context, and community.'[127] Freyfogle draws on history, identifying a watershed period after the Civil War in the United States, when a distinct public-private divide became prominent.

> The new public-private divide particularly influenced the ways people thought about private property… an entitlement that people held in their private lives. It was something they exercised not as a springboard to virtue and public service as in the 18th century or as part of a larger community, but to protect their privacy and promote their personal economic welfare. …As an intellectual concept, private property had largely been freed from communal obligations in a way that …reflected and fueled the breakdown of community-centered sentiment.[128]

In a stewardship context, excessive individualism conceals the substantive *truth* of a landowner's[129] communal responsibilities.[130] Communitarian obligation is central to Aldo Leopold's 'land health', where 'a conviction of individual responsibility' to land'[131] is proportionate to an understanding of wider community responsibilities.[132] US Supreme Court Justice Blackmun,[133] adopted Leopold's refrain when he spoke of the context of private ownership.

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[125] Alexander, above n5.
[126] Underkuffler, above n101.
[127] Freyfogle, above n8, 108.
[128] Eric Freyfogle*, The Land We Share Private Property and the Common Good* (2003) 81.
[129] Cf Penalver argues that the virtue of humility applies equally to private and public owners, Penalver, above n7.
[130] Christopher Elmendorf, above n109, 437; Eric Freyfogle, "Private Rights in Nature: Two Paradigms" in P. Burdon (ed.) *Exploring Wild Law The Philosophy of Earth Jurisprudence* (2011).
[131] Aldo Leopold, *A Sand County Almanac* (1948) 236. Land health is the capacity of land for self-renewal.
[132] Leopold, above n2, 23-5; Meine, above n1, 321.
[133] The dissenting judgment is that of Justice Douglas who cited Christopher Stone's article in his opening paragraph.

'In this environmental context, I personally prefer the older and particularly pertinent observation and warning of John Donne … no man is an island, entire of itself, every man is a piece of the Continent, a part of the main.'[134]

The decoupling of private ownership and communal obligation is prominent in disputes where landowners perceive that environmental restrictions represent a loss of property rights.[135] In Australia, the implementation of native vegetation laws or water buy-back schemes is frequently countered by claims that property rights are being stripped away.[136] Lynton Caldwell recognizes the futility of imposing stewardship obligations in the absence of cultural change, as such disputes illustrate.

> Before a land use system can embrace stewardship, society itself must shift its focus of attention from the rights of the current landholder to the communal rights of all present and future society members.[137]

Excessive individualism has perverse consequences. Karp observes that 'individuals have won…excessive autonomy' and a consequential 'sheer irresponsibility'.[138] The collective result of such excess is 'a disassociation of humans from their environment on which they rely for survival'[139] and an isolationist artificial view of the (non) context of property rights in land.

4.2 Land as commodity

Alexander's 'property as commodity' has been the dominant half of his dialectic. Particularly in settler societies, mobility has been dependent on a commodity view of land. Andrew Buck's explanation of the development of a distinctively Australian property law emphasizes the centrality of

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[134] *Sierra Club v Morton* cited in Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (2nd ed., 1988) 94.
[135] Elmendorf calls 'rural landholders the most consistently anti-environmental demographic…in America.' Elmendorf, above n109.
[136] *Spencer v Commonwealth of Australia* [2010] HCA 28; Paul Martin et al, 'Environmental Property Rights in Australia: Constructing a New Tower of Babel' (2013) 30(6) *Environmental and Planning Law Journal* 531.
[137] Caldwell, above n16, 323.
[138] Karp, above n6, 742.
[139] Ibid.

egalitarianism, an equal opportunity for all to acquire wealth through land as the original commodity.[140] Similarly in the United States

> [t]he period of the European colonization of America witnessed a transition in the status of man-land relationships from vestiges of feudal land tenure to the treatment of land as a marketable commodity. The transition continued over several centuries and was influenced by economic forces and opportunities, rather than by a theory or master plan…. The possession of land conferred security, economic freedom, and social status, and the settler in America developed a deep hunger for ownership of land such as he could never have hoped to satisfy in the Old World. As an owner of land, he owed no obligation to neighbor or posterity, and very little to the state.[141]

Viewing land as a purely fungible commodity has consequences for place, and the responsibilities owners have for its land health. Curt Meine's study of the US survey grid is illuminating in terms of the links it draws between commodity and abstraction. To Meine, the survey abstracts reality. Its standardized treatment of land 'overwhelmed the particularities of place, and for generations, encouraged the adoption of a hard utilitarian view of land *as commodity*.'[142] Commodification has moral consequences, because it 'focuses…on the instrumental value of the good for sale, leading us to undervalue or disregard its inherent worth.'[143]

Theodore Steinberg's satire of the ownership of nature has a similar theme, landscapes such as Arizona's Sonoran desert suffer when 'the impulse to turn everything into [private] ownership… imposes the 'logic of capitalism' on the 'nonideological matter-in-motion we call nature'. To see land as simply its

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[140] Buck, above n30.
[141] Caldwell, above n16, 761.
[142] Meine, above n1. Corner attributes the National Land Survey to Thomas Jefferson's concern to make land available for purchase. Its unintended consequence 'is a ubiquitous and standardized built environment... [where] every place, regardless of special characteristics, begins to look and feel alike - neutral, flat and bland.' James Corner, *Taking Measures Across the American Landscape* (1996) 32.
[143] Hamilton & Bankes, above n93, 33. In the 1930s Leopold observed a phenomenon of farmers setting aside small areas for the restoration of prairie grasses. Leopold saw the first stirrings of a "capital R Revolt – a revolt against the constricted tedium of a merely economic attitude towards land.' Aldo Leopold, *A Sand County Almanac with other Essays on Conservation from Round River* (1966).

monetary value is symptomatic of 'a culture so single-minded in its pursuit of … private property, [that it] may sacrifice what one anthropologist has called its "evolutionary flexibility" and thereby foreclose on other ways of relating to the earth.'[144]

4.3 Abstraction

Modern property also lacks connection to place, lost at some indeterminate tipping point when its focus shifted from the relationship between person and thing, to the relationship between person and person. The consequence of this de-contextualization is abstraction,[145] a *fait accompli* so complete that jurists debate whether property is illusory 'thin air'.[146] Abstraction has cast stewardship haplessly adrift, the artifice of person-to-person relationship denying it physical nexus. Michael Metzger recognizes its ecological risk.

> The source of our malaise may … be rooted in our capacity for dealing in abstractions … The invention of language… has enabled us to create separate realities, and to remove ourselves from the natural world in which we live to a cerebral world of our own creation. When we act in accord with our artificial world, the disastrous impact of our fantasies upon the natural world in which we live is ignored.[147]

The entrenchment of abstraction in the Anglo common law has been an incremental yet unswerving process that began in earnest in the 18th century enclosure period. Enclosure marked a displacement of communitarian and social ideas of property diversity, with liberal notions suited to a more universal private property. Enclosure was totemic because it imposed metaphorical, de-physicalized rights on land and swept away ancient place-

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[144] Theodore Steinberg, *Slide Mountain, or the Folly of Owning Nature* (1995) 10.
[145] Burdon, above n130, 718-9; Caldwell, above n16, 322; Steinberg argues that property law serves to reduce the complexity and mobility of nature into a 'giant legal abstraction.' Property law is 'the voice of reason that we use to tidy up the messy and dynamic world of nature.' Ibid.
[146] Kevin Gray, 'Property in Thin Air" (1991) 50 *Cambridge LJ* 252. Stuart Banner calls it 'the disappearing right'. Banner, above n4, 106-8.
[147] Michael Metzger, 'Private Property and Environmental Sanity', (1975-1976) 5 *Ecology LQ* 793, 796.

based rights.[148] Improvers, enclosers, and colonizers were said to prefer 'a preordained cartographic structure of abstract space to the physicality and particularity of place.' Nicole Graham cited landscape historian John Barrell to lament this loss

> To enclose an open field parish means in the first place to think of the details of its topography as quite erased from the map. The hostile and mysterious road system was tamed and made un-mysterious by being destroyed; the minute and intricate divisions between lands, strips, furlongs, and fields simply ceased to exist…[149]

Such radical change meant more than a mere readjustment of property right. Jeanette Neeson observes that common rights, what she termed 'ownership without possession', conferred on commoners a sense of who they were and where they belonged.[150] The 1788 case of *Steel v Houghton*[151] illustrates dispossession from place. In *Steel,* rights to glean enjoyed by the indigent parishioners of Timworth were swamped by new ideas of property. Common property rights became a 'mere practice' condemned by their 'universal promiscuity' and perceptions of vagrancy. Where once property rights enforced links to place, they now policed exclusion through trespass.

This estrangement of right from place was further entrenched by the rise of a new property metaphor, the relative, divisible bundle of rights. 'Ownership of land was no longer one aggregate right; but many distinct rights, of which a landowner could possess few or many.'[152] The metaphor suited the changing times because its parts, especially the right to exclude, enabled the intensive exploitation of land and its resources free from interference. Land could be exploited without consequence to place. As Michael Heller notes

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[148] Freyfogle sees this disconnect between abstraction and context not only in terms of private property, but also ethics and ecology. Freyfogle, above n8, 107-127.
[149] Graham, above n3, 66. 'Standardized, universal and measurable space [was] grafted over place so that the physicality and particularity of places became irrelevant'. Ibid.
[150] J M Neeson, *Commoners: common right, enclosure and social change in England, 1700-1820* (1993) at 180.
[151] *Steel v Houghton et Uxor* (1788) 126 ER 32 in Buck, above n30.
[152] Freyfogle, above n128, 19.

> While the modern bundle-of-legal relations metaphor reflects well the possibility of complex relational fragmentation, it gives a weak sense of the "thingness" of private property.[153]

For many reasons,[154] the bundle percolated into property discourse, and in 1888, two influential articles solidified its dominance.[155] By the early 20th century, the seminal analysis of Wesley Hohfield (canvassed in chapter 1) entrenched the removal of legal relations from physical facts, such that 'land is not property, but the subject of property.'[156] Another contemporary abstraction was the hypothetical *Blackacre*. If landowner rights were essentially identical, then *Blackacre* was a useful contrivance to symbolize a universalized property in land. Freyfogle traces the rise of *Blackacre* to Harvard Law School in 1870, where the pedagogical practice of 'scientific case method' instilled rigor, the law library became a laboratory, and law reports evolved into data. To learn law, 'a student need not and should not engage with the messy outside world. There was no need to pay attention to actual people, to struggle with ethical enigmas, or know anything about nature.' [157] This approach fostered high abstraction. 'In the case of property law, land was land and a parcel's physical features and context were legally irrelevant. So irrelevant was context that law students did not talk of real places, but hypothetical tracts such as Blackacre.'[158]

Abstraction in property has advanced by stealth. Stuart Banner blames property academics in part for its subtle entrenchment.

> There were no newspaper editorials or popular magazine articles insisting that property was or was not a relationship between people. Only lawyers

[153] Michael Heller, 'The Boundaries of Private Property' (1999) 108 *Yale LJ* 1163, 1193.
[154] Fairfax sees the bundle as a weakening of the Lockean ideal of property. Banner explains its rise in terms of a judicial willingness to widen the US constitutional takings clause. Goldstein links its ascension to the burgeoning worth of corporate and intellectual property, 'from things to rights reflected the rise of corporations and commercial and intangible property.
[155] Robert Goldstein, 'Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law', (1998) 25 *B.C. Envtl. Aff. L. Rev.* 347, 367.
[156] Banner observes that Hohfield's lasting legacy was his emphasis on property as relations between people, Banner, above n4.
[157] Freyfogle above n8.
[158] Ibid.

> thought about the issue, and even then only a probably very small fraction of the most philosophically inclined. … And of course law schools were the entry point for an increasingly large percentage of the broad policymaking community. All law students took a course in Property, and more and more of them would learn that property was not about things; it was about power over people.[159]

Its incremental effect (whether by accident or design) is that property terminology fictionalizes the relationship between people and place,[160] and removes it to a plane, where human actions, destructive or constructive, have no relevance or consequence. When Mary Houghton was legally displaced from ex- common lands of 18th century Timworth, a connection with her local place was irrevocably severed. By the early 20th century, 'relationship to place [was] irrelevant' and any thought to the contrary, Hohfield argued, was 'fallacious'.[161]

Peter Burdon says this is 'a most extraordinary idea' and 'one that would surely puzzle many farming communities that have farmed sustainably and lived on the land for generations.'[162] But such people have what geographer Edward Relph calls an 'authentic attitude to place'. From such relations, 'authentic places emerge, places which in turn sustain the earth and those dwelling upon it.' But centrality of place is 'a mode of experiencing place that is not available to everyone. In fact, in modern daily life…it is becoming increasingly rare', a phenomenon exacerbated by Brody's transient mobility or Kunstler's 'geography of nowhere'[163], the 'weakening symbolic qualities of modern places.'[164] Property's abstraction cannot speak to or describe an individual parcel of land's ecological limits. Nor can it remedy deepening estrangement from place. Hence stewardship is left stranded by a property

[159] Banner, above n4, 106.
[160] Hohfield, above n91. 'Much of the difficulty, as regards legal terminology, arises from the fact that many of our words were originally applicable only to physical things so that their use in connection with legal relations is, strictly speaking, figurative or fictional.'
[161] Burdon, above n130, 719.
[162] Ibid.
[163] James Kunstler, *The Geography of Nowhere* (1993).
[164] Rob Garbutt,, *The Locals* (2012) 55. Geographer Yi-Fu Tuan sees profound sentiment for land only persisting 'in places isolated from the traffic of civilization.' Yi-Fu Tuan, *Space and Place The Perspective of Experience*, (1977) 156.

dialogue that speaks solely of artifice.[165] Writ large, abstraction blinds us to the 'one terrible fact … that civilization is just russeting on the skin of the biosphere.'[166]

4.4 Land memory

The cumulative effects of abstraction, individualism, and a 'land as commodity' mentality, are harmful property patterns, what Penalver calls 'land memory.[167]

More consequential than causative, land memory works in two ways. Firstly, physical changes made to landscapes tend to permanence, either because the change is irreversible, or it is too costly to remedy. And the finitude of land means that particular choices made about land use or property type necessarily restrict alternatives. Thus, the conversion of prime agricultural land into housing lots is a decision that has lasting land memory implications for both the stock of residential land and the corresponding quantity of food producing land. The same dynamic works for urban private property and public open space

> Changes that human beings make to the land have a tendency to remain in place until they are affirmatively removed. And because the quantity of land is fixed, we are fated to live our lives within the landscape that bears the indelible print of our forbears, even if we do not always recognize that imprint for what it is.[168]

Secondly, the tenacity of land memory produces landscape inertia, an interplay of individual factors, physical, psychological, and social, that 'pre-suppose and yield a pervasive path-dependence in land use.'[169] Accordingly,

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[165] 'The rectilinear grid imposed on the earth's surface by the imperial survey… ha[s] no connection to the lie of the land- and in a sense, no interest in it. ' Paul Carter, *Dark Writing Geography, Performance and Design* (2009) 80.
[166] Alexander & Penalver above n62, 50.
[167] Penalver defines land memory as "the combined impact of the durability of land uses and the stabilizing consequences of human sociality, Penalver, above n7, 827.
[168] Ibid.
[169] Ibid, 831

the blunt knife used to carve out property patterns establishes land uses that 'reinforce one another in ways that make it difficult to undo one piece without affecting many others.' One single land use cannot be regarded in isolation, it is part of an interconnected network that is 'collectively, exponentially more durable than each of its constituent parts.'[170]

Property patterns closely inform land memory, and its self-perpetuating inertia. Eric Freyfogle's bleak account of Champaign County, Illinois, where public property accounts for less than 1% of the county "setting aside roadways and the remnants of a now-abandoned [and contaminated] air force base'[171] is a depressing vision of a landscape monotone locked into inertial stasis. Conversely, diverse property patterns may enable more positive path dependencies that enhance human flourishing. James Kunstler's description of childhood visits to a New England town with its 'substantial and dignified' public spaces, are a stark counterpoint to the bland suburbia where he grew up, and its exultation of the private realm.

Freyfogle's 'tragedy of fragmentation' can also be understood through the land memory lens. Freyfogle describes the landscape tragedy of disconnected private parcels, enclaves lacking any overarching mechanism to achieve landscape-scale goals, including stewardship. Where the blunt knife has carved out separate, disconnected property monotones, the results tend to permanence and self-reinforcement.

4.5 Conclusion

Thus far, this chapter argues that seeing property through a narrow, one-sided private view impedes land stewardship. It renders its definition problematic beyond instrumental terms, fosters structural imprecision, and pushes stewardship to doctrinal and theoretical fringes. And to complete the picture, individualism, abstraction, and commoditization close the loop and

[170] Ibid
[171] Eric Freyfogle, 'Private Rights in Nature: Two Paradigms' in P. Burdon (ed.) *Wild Law The Philosophy of Earth Jurisprudence* (2011) 271.

institute an endless circularity. By contrast, part 5 explores an alternative vision: the links between *property diversity* and stewardship alluded to in the closing paragraphs of this part 4.

5. Property diversity and stewardship

Stewardship is more likely to emerge where land use externalities have consequence. Contrast this to an individualized view of property; abstract and divorced from place, where externalities, harmful or otherwise, have no, or negligible, impact. As Henry Smith surmises

> The bundle-of-rights picture of property treats property in atom-counting fashion, which is fine as far as it goes. But what we still need is a theory of how the pieces fit together.[172]

Property diversity is a theory that amongst other things describes that the pieces can fit together, one truthful of 'property on the ground.' As such, cause and effect can be traced, its inter-connective structure less likely to make externalities 'magically disappear'.

This part 5 describes the architecture of property diversity, and its similarities to both environmental conceptions of property and alternative property metaphors. It next considers the inter-connective effect of diversity's 'normative mosaic', the mix of property values that the private, public and common estates add to landscapes. Lastly, it analyses property diversity though the perspective of performance theory, the imaginative idea that *doing* creates reality. It observes that acts of stewardship often involve cross-boundary partnerships of private, public and community landowners, and asks whether a greater 'seeing' of good land use performances across diverse property fora may help to unfreeze an otherwise intransigent paradigm.

[172] Henry Smith, 'Property as the Law of Things', (2012) 125 *Harvard Law Rev.* 1709.

5.1 The architecture of property diversity

Property diversity is important because it provides an institutional structure for the detection and measurement of harmful land use externalities. By contrast, as Henry Smith infers, if we see private property as an atom counting exercise, then we are blind to any overarching structure. Its legacy is to perpetuate the piecemeal; a belief that good land use can be achieved through the novel application or recalibration of *individual* property tools.[173]

The downside to atom counting is that it is *ad hoc.* It applies micro-solutions to macro-landscape problems, such that atomistic perspectives yield atomistic solutions. Paul Babie thus imagines urban landscapes re-shaped by an evolved easement for light that enables 'green roofs and green spaces', or easements of 'solar access' or 'wind power' that secure renewable energies.[174] It also leaves the 'heavy lifting' to incorporeal hereditaments, while widespread interests, such as leases, lay unused or under-utilised in the property toolbox. It also raises issues of enforceability. 'Rights' of amenity or aesthetics (like prospect[175] or *jus spatiandi*[176]) are traditionally unenforceable as easement rights,[177] raising doubts as to the easement's environmental efficacy. Similarly, covenants have long struggled to achieve proprietorial credibility; positive covenants require legislative intervention to overcome common law prohibitions,[178] while restrictive covenants must satisfy onerous tests as to the running of their benefit and burden in equity to have teeth.[179] Susan French sees 'problems of the future' frustrating conservation covenants, especially those granted in perpetuity.[180]

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[173] David Grinlinton, 'Property Rights and the Environment' (1996) 4 *Australian Property Law Journal* 1, 28-29.
[174] Paul Babie, 'How Property Law Shapes Our Landscapes' (2011) 38 *Monash University Law Rev.* 1, 16-23; Adrian Bradbrook, 'The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector' in *Property and the Law in Energy and Natural Resources* (2009) 391-412.
[175] Douglas Fisher, 'Can the Law Protect Landscape Values?' (2005) 9 *NZ Journal of Envtl. Law* 1, 23.
[176] Babie, above n174, 21.
[177] An easement will not be propertised if it does not accommodate the dominant tenement or form the subject matter of a grant.
[178] Rule in *Austerberry v Oldham Corporation* (1885) 29 Ch D 750.
[179] In Queensland, covenants cannot be registered in the Torrens register, and are effectively unenforceable, s 98A *Land Title Act 1994* (Qld).
[180] These include that the conservation goals that covenants protect may become obsolete, useless or even harmful, or that development pressures will become too intense for private

Another problem is a mal-adaptation of traditional common law interests to suit contemporary environmental ends. Samantha Hepburn criticises the misuse of profits-a-prendre for the storage of sequestered carbon,[181] noting that profits are conceptually concerned with extraction, yet the sequestration of carbon on forested land is primarily directed at long-term storage.[182]

An alternative solution is to craft new statutory *sui generis* rights in the place of inappropriate common law ones. To start from a blank slate overcomes an institutional problem, 'structural change in established property systems is not a prevailing theme. Property systems are inherently conservative, seeking continuity in their basic internal framework.'[183] Adrian Bradbrook agrees that it is up to the legislature to take the lead in creating new property rights, in his case, to foster alternative energies.[184] Bradbrook cites statutory solar access rights in New Mexico as a template for analogous on-shore wind energy rights.[185] The pace of change required and the need for harmonisation is beyond the common law's incrementalism.[186] While worthwhile, this debate is stuck in the mindset of the individual property interest, be it existing or novel, judicial or statutory. The emphasis remains as to how *private* property rights shape landscapes.[187]

By contrast, Douglas Fisher looks to the bigger picture of how the law protects landscape values. Fisher concludes that 'for most purposes, the general principles of common law have proved not very effective - largely because they are linked to issues of property and land in individual ownership.'[188] Despite property's natural predilection, the 'perception of landscape [being] inextricably

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land trusts to resist, Susan French, 'Perpetual Trusts, Conservation Servitudes, and the Problem of the Future' (2005) 27 *Cardozo Law Rev.* 2523.

[181] Samantha Hepburn, 'Carbon Rights as New Property' (2008) 31 *Sydney Law Rev.* 239.

[182] Ibid, 244.

[183] Ibid, 240.

[184] The role of the common law is a 'subsidiary' only, Adrian Bradbrook, 'The Role of the Common Law in Promoting Sustainable Energy Development in the Property Sector' in *Property and the Law in Energy and Natural Resources* (2009) 411.

[185] Ibid, 403.

[186] Ibid, 410-411.

[187] Babie, above n174.

[188] Fisher, above n175, 23.

linked to a range of notions of property',[189] property law has proved ineffectual in protecting landscape values. Fisher attributes this to property's preoccupation with individual rights, and the disconnect this paradigm has with values 'enjoyed and appreciated by members of the community at large.' 'If the land associated with the landscape is the subject of individual rights of property, then these rights of property are unlikely to be a suitable or effective mechanism through which the values of landscape may be protected.'[190] Significantly, Fisher hints (in passing) that embracing a wider concept of property may be advantageous, citing native title or common property as emerging exemplars of property pluralism. '

Fisher anticipates the potential of property diversity.[191] As already traversed in chapter 4, context, inter-connectivity, and a faithful representation of real-life propertied landscapes are its hallmarks. This architecture[192] of property diversity is also fundamentally the framework of an 'ecological view of property.'[193] In 1992, Joseph Sax recognized an emerging 'economy of nature' as requiring a 'different attitude towards land and the nature of land ownership itself.'[194] In this economy, land's ultimate worth is measured by its provision of environmental services.

> Land is not a passive entity waiting to be transformed by its landowner. Nor is the world comprised of distinct tracts of land, separate pieces independent of each other. Rather, an ecological perspective views land as consisting of systems defined by their function, not by man-made boundaries. Land is already at work, performing services in its unaltered state.[195]

Sax identifies four features of a re-defined 'property' that serves both the needs of a transformative economy and nature's economy. First, there is 'less

[189] Ibid 5.
[190] Ibid,6.
[191] 'Notions of property cannot be ignored, they lie at the foundation of the [landscape] system.' Fisher, above n175, 6.
[192] Smith advocates that 'an architectural approach to property can do much better [than the bundle metaphor].' Smith, above n172, 1692.
[193] Joseph Sax, 'Property Rights and the Economy of Nature Understanding *Lucas v. South Carolina Coastal Council* the Economy of Nature' (1992) 45 *Stanford Law Rev.* 1445.
[194] Ibid, 1445 - also refer to the table on 1445-6.
[195] Ibid, 1442.

focus on individual dominion', second, more public decision-making about private land uses, third, increased ecological planning, and fourth 'affirmative obligations by owners to protect natural systems.'[196] Collectively these attributes are 'public, planned and ecosystemic'.[197] Sax also sees the usufruct as the 'closest existing model' to capture an owner's revised property rights in an economy of nature, a right that does not confer exclusive dominion, but rather a 'right to uses compatible with the community's dependence on the property as a resource.'[198] Sax sums up ecological property as characterized by 'physical interconnections and community dependence on a resource's natural functions',[199] a design (absent external regulation) with strong similarities to the architecture of property diversity.

The structure of property diversity also has its analogies in alternative property metaphors. While modern property is famously described as a bundle of private stick rights, the rise of environmentalism in the 1960s, and the basic ecological tenet 'that everything is connected to everything else'[200] has weakened its hegemony. Its slow unraveling is symbolized by ideas such as Robert Goldstein's minimalist 'green sticks' inserted into the bundle[201]Myrl Duncan likewise re-engineers the bundle with an emphasis on context and public rights in land,[202] adding a 'public cord' to *complete* the bundle, symbolic of the ecological and communal bonds that connect and bind disparate private sticks.[203] By contrast, alternative metaphors reject the disaggregated bundle in favor of holistic, inter-connected conceptualizations analogous to diverse property.[204] Tony Arnold's 'web of interests' is oft cited, featuring 'interconnections among persons, groups, and entities with an … identifiable

[196] Ibid, 1451.
[197]Ibid.
[198]Ibid, 1452.
[199] Ibid, 1453.
[200] Metzger, above n, 147, 797. Yannacone suggested 'social property', an evolution of private property that recognized its non-absolute traditions, and the public interest in private land stewardship.' Victor Yannacone, above n104; Babcock & Feurer, above n105; and (slightly later) David Hunter, "An Ecological Perspective on Property: Calls for Judicial Protection of the Public Interest in Environmentally Critical Resources" (1988) 12 *Harv. Envtl. L. Rev*. 311.
[201] Goldstein, above n155, 374.
[202] Myrl Duncan, "Reconceiving the Bundle of Sticks: Land as a Community-Based Resource", (2002) 32 *Envtl. Law* 773.
[203] Ibid, 804-5.
[204]Amnon Lehavi, 'The Property Puzzle' (2008) 96 *Geo. L. J.* 1987.

object at the center of the web.'[205] Water is another powerful metaphor suited to the diversity model, symbolic 'of context and relativity, accommodation and community.'[206]

Henry Smith's 'modular' or 'architectural' theory is an insightful (and recent) addition to the catalogue of property metaphors.[207] Smith sees property as a series of inter-connected modules, a basic architecture 'whose parts are not as detachable as the bundle view would have it'.[208] As semi-autonomous and mostly self-contained modules,[209] their level of interaction is less obvious. What is often seen is the intense level of interaction *within* the module, while inter-modular connections are minimized in number, or concealed through interfaces that are 'information hiding and limited.'[210] Smith draws the analogy to a car, where independently functioning modules (such as braking systems and air-conditioning units) operate as part of an overarching architecture, but for reasons of information cost, most users do not need to know their level of integration. Smith says that a modular theory of property is information cost-effective in managing property's complexity. Property owners need only know the relationship of how their property rights interact with related rights, and not the full architecture, much like knowing that hitting the brake pedal will stop the car. In explaining the popularity of the bundle, Smith notes that it only provides a 'partial outlook' of the whole property structure. Modularity by contrast 'furnishes the things that property as a law of things contributes to private law,'[211] and 'explains the structures we do not find.'[212]

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[205] The 'web' metaphor aligns with two environmental principles, 'the interconnectedness of people and their physical environment, and the importance of the unique characteristics of each object. C A Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26 *Harv. Envtl. L.Rev.* 281, 281, 333. Kristen Carpenter et al concur that the bundle is inapt in its depiction of stewardship. Carpenter at al, above n55.
[206] Eric Freyfogle, 'Context and Accommodation in Modern Property Law', (1988-1989) 41 *Stanford L. Rev.* 1529.
[207] Smith dismisses the bundle as 'more of a description than a theory', Smith, 'above n172, 1694.
[208] Ibid, 1700.
[209] 'Clusters of complementary attributes' Ibid, 1703.
[210] Ibid, 1703.
[211] Smith, above n172, 1726.
[212] Ibid, 1702.

Smith's modular theory has implications for property diversity, in depicting not only modules of 'lumpy' private property rights, but also their near-opaque links to public and common modules, structures 'we do not find'. But his theory is of most interest in explaining the effects, or non-effects, of externalities. It may explain why the adverse impacts of harmful land uses escape notice, since the impact is absorbed within the largely self-contained module, while any extra-modular 'ripples' almost disappear in the latent interfaces that exist between modules.

> Modularity manages complexity, because the ripple effects of modifications to one module have more defined consequences (through interfaces) than they would in an unconstrained system. … The system is easier to understand and to modify, and less vulnerable to shocks. Interactions and interdependencies can be intense within modules but are defined and relatively sparse across the interface with other modules. The key is that the interface allows only certain information through; the rest is "hidden" in the module.[213]

Externalities 'hidden in the module' are nothing compared to the atomized universally detachable bundle of sticks that deem harmful land uses irrelevant. Joseph Singer identifies property norms arising from the 'ownership' or 'castle' models of property as responsible for making externalities 'magically disappear'. Singer argues that the exercise of property rights always has impacts on others,[214] externalities imposed 'on [those] not directly involved in a transaction or act.'[215] Where no 'legally relevant harm' is caused, such externalities are 'self-regarding'.[216] Conversely, where the effect is adverse, it is a *harmful* externality. Importantly, a society's property norms interact with externalities by determining which acts are harmful, and which are benign self-regarding ones. In making this judgment, they then operate to 'reveal or obscure the presence of externalities.'[217] In castle or ownership models, property norms

[213], Ibid,1701.
[214] Singer , above n58, 1048-9.
[215] Joseph Singer, 'Property Norms Construct the Externalities of Ownership' in *Property and Community*, 57, 60 (Gregory Alexander & Eduardo Penalver eds., 2010) 57, 61.
[216] Ibid, 63.
[217] Ibid, 79.

frequently hide harmful impacts on others (including the environment), such effects dismissed as *self-regarding* because property norms deem them so. In this way, adverse externalities 'magically vanish'[218] since the prevailing property norm does not value or recognize the affected other's property 'rights'. As traversed in chapter 4, Singer's preference is a relational or socially situated concept of property, his 'environmental' or 'good neighbor' model. In such conceptions, property norms expose rather than conceal harmful externalities.

The monistic 'property strategy' divides human landscapes into discrete parcels of individual ownerships. As Thomas Merrill observes, this strategy is a double-edged sword when it comes to externalities

> One advantage of this strategy… is that it eliminates certain kinds of externalities, notably those associated with commons tragedies. But the very process of carving up the world of resources into little boxes of ownership generates the preconditions for new externalities. By dividing the world into units of autonomous owner control, the property strategy creates a built-in incentive for owners to ignore aspects of their management that affect other units of autonomous owner control.[219]

The architecture of property diversity ensures that any 'in-built incentive' to ignore harmful land uses is not realised. As Merrill predicts, 'paradoxically, private property must be interlaced with networks of open-access or public property if it is to work effectively as a strategy for managing resources'',[220] a 'Swiss-cheese pattern of ownership alternating between public and private property.'[221]

If seeing property as a bundle of sticks is only a partial outlook as Smith supposes, then seeing property as slightly connected modules of lumpy private rights is but a further extension of the vista. The architecture of property diversity

[218] Ibid.
[219] Thomas Merrill, 'The Property Strategy' (2011-12*) Uni. Pennsylvania Law Rev*. 2061, 2089.
[220] Ibid, 2091.
[221] Ibid, 2092.

is the long-range 'full picture', one where the inter-connections of public, private, and common modules are more clearly in focus, and the implications of adverse land uses can both be seen and measured in this 'age of ecological consequence'.[222]

5.2 Normative diversity

The optimal conditions for land obligation are also enhanced when a visible property mosaic yields a 'normative mosaic' commensurate to the diverse mix on the ground. As outlined in chapter 4, property diversity inculcates multiple values across landscapes. To 'see' the totality of the private, public and common estates is to enliven a 'values mosaic' unique to each landscape.

This part suggests that normative diversity may be desirable for a number of reasons: first, it reflects the *truthfulness* of property patterns, 'the heterogeneity of property's real-life manifestations'.[223] Second, it dilutes the values of property monism. Third, it has the potential to re-balance the collective values of land ownership. Discussion of the first and third rationales (essentially the architecture of *community* and how different communities manifest) is postponed to chapter 6. This discussion will concentrate on the second.

Exclusively private landscapes act in two ways: they distort the values of private property, and they marginalize or discredit any non-private value alternatives. As discussed in chapter 1, an unrestrained private estate falsely conflates exclusivity, and as noted earlier in this chapter, it promotes hard, utilitarian views of 'land as commodity', where land is seen in purely instrumental rather than ethical or personhood terms. Hanoch Dagan is critical of the values of a monistic view of property. Dagan says they fail to describe the 'lived' experience of property, the truth of people's relationships with the various 'institutions of property' and the variable nature of the resource. His

[222] Grinlinton & Taylor, above n39, 4.
[223] Ibid, xii.

pluralistic view of property by contrast enables 'rights and responsibilities' and promotes human values.

> [E]xisting property configurations both construct and reflect the optimal interactions among people in given categories of relationships and with respect to given categories of resources. By facilitating such various categories of human interactions, the forms of property can promote important human values. Some property institutions are structured along the lines of the Blackstonian … "sole despotic dominion." These institutions are atomistic and competitive. Other property institutions… are dominated by a much more communitarian view of property., in which ownership is a locus of sharing. Many other property institutions…lie somewhere along this spectrum between atomistic and communitarian norms. For instance with … common interest communities, both autonomy and community are of the essence, and thus ownership implies both rights and responsibilities.[224]

What type of values mosaic is produced in the wake of the property mosaic? Or to put the question another way - what values do different property types contribute to a whole of landscape perspective? Chapter 2 has canvassed sociability,[225] and 'pedestrian democracy'[226] as enduring values of public property. In chapter 3, Carol Rose describes the norms of common property as 'great bodies of law … [that] revolve around an ethic of moderation, proportionality, prudence and responsibility to the others who are entitled to share in the common resource.'[227] And private property has been shown to be far more multivalent than supposed.[228] The end yield is a values polyglot where private-centric impediments to land obligation are less dominant, and overlooked communitarian and social values provide balance.

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[224] Hanoch Dagan, *Property Values and Institutions* (2011) 29.
[225] Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, (1986) 53 *U. Chi. L. Rev*. 711.
[226] Kevin Gray, 'Pedestrian Democracy and the Geography of Hope' (2010) 1 *Journal of Human Rights and the Environment* 45.
[227] Carol Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems', (1998-1999) 83 *Minn. L. Rev*. 129.
[228] 'It is a mistake to view private property as one-dimensional, that its values embrace more than simple commodity. Dagan, above n224.

> [F]orms of property matter… because these configurations of property rights constitute property institutions that facilitate various categories of human interaction, and thus promote important human values…. As human institutions, the forms of property should be crafted through bundling in a way that fortifies their normative desirability.[229]

Nor are property values static. For Dagan, pluralism means ongoing evaluation of the 'institutions of property' in terms of their values and 'continued validity and desirability.'[230] Such a fluid approach 'is … an exercise in legal optimism, an attempt to explain and develop the existing property forms in a way that accentuates their normative desirability while remaining attuned to their social context.'[231] Like the reiterative effect of varied stewardship performances (to be discussed next), normative diversity has the potential to 'unfreeze' the dominant values of the ownership model, and to allow others in.

5.3 A performance theory of stewardship

Performance theory posits that 'social reality is a relational effect brought into being by the very act of performance itself.'[232] In other words, the reality of stewardship depends on its repeated acts and representations. Under this theory, stewardship is not a pre-existing concept, but an effect constructed through constant practice. This deceptively simple idea is powerful because it is the antithesis of abstraction.

Performance theory applied to property diversity provides 'real world' examples of public, private and community acts of stewardship across a plurality of fora. It intensifies the quantum of stewardship performance, and widens the class of steward-actors. Optimistically, it shifts stewardship from isolated one-off acts of altruism, to collective acts of land use that are universalizing and normalizing by their frequency and spread. Its most critical

[229] Ibid, 35.
[230] Ibid.
[231] Ibid, 31.
[232] Cited as performativity theory by Nicholas Blomley, Blomley above n39, 13.

effect may lie in its 'unfreezing' of property abstraction. Nicholas Blomley's use of performance theory to describe 'the ownership model of property' is equally analogous to stewardship. [233] To (mis)quote Blomley[234]

> If [stewardship] is a form of "frozen politics," an emphasis upon the *performance* of [stewardship] perhaps begins to offer us some tools for an unfreezing to the extent that it alerts us that [stewardship] is iteratively produced in concrete social contexts, not found.[235]

Doing acts of good land use in 'concrete social contexts' may be the simple tool that shifts focus. It may unfreeze our thinking about land stewardship, away from having to link duty with right, the discourse of subject-object, or other innumerable dilemmas. Stewardship simply *is* because it is *done.* When performed in diverse property settings, its doing is multiplied and accentuated by its differences.

Performance theory also requires successful repetition. Similar acts build, precedent-like, on what has been performed before, providing templates for future acts. Blomley describes performance as 'always derivative, taking hold and becoming real in the world to the extent that it successfully cites other such performances, and in so doing, compels future similar performances.'[236] This s*tare decisis* effect of performance is called *citational*. The past acts that a present act must cite to demonstrate validity have to be 'more or less successful'. By contrast, citational failures are 'less likely to have performative effect, and thus to become reality.'[237] In stewardship literature, piecemeal accounts of failure are numerous. There may be insufficient public ownership of critical conservation lands,[238] over-reliance on financial 'carrots' such as incentives or grants,[239] unsustainable retreats into national park 'ghettos',[240]

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[233] 'Recognizing the commons in our midst thus becomes a crucial political task through which non-capitalist possibilities can be discerned and revalorized.' Blomley, 33.
[234] The 'misquote' substitutes 'stewardship' for the words 'the ownership model of property.'
[235] Blomley, above n39, 31.
[236] Blomley, 17.
[237] Ibid.
[238] Bradley Karkkainen, 'Biodiversity and Land', (1997-1998) 83 *Cornell L. Rev.* 1
[239] Elmendorf, above n109; Neil Gunningham and Mike Young, 'Toward Optimal Environmental Policy: The Case of Biodiversity Conservation', (1997) 24 *Ecology LQ* 243.

or dysfunction outside small homogenous groups.[241] Narratives of anecdotal failure are intended as lessons to avoid past mistakes, but their unintended consequence may be a debilitating precedent of citational failure.

Nor is citation enough. Performances must also be *reiterative*, since 'for property to be made real requires sustained, repetitive… often complicated work.'[242] Endlessly repeated performances are its precondition and means for continuance, what Blomley terms 'sedimented, repetitive, duplicated form.' Reiteration means that stewardship must be mundane and engrained, not exceptional. Reiteration is a concept familiar to the common law of property. The truism that landowners 'cannot sleep on their rights' is a warning that owners must continuously signal explicit indicia of possession, lest the law reward adverse trespassers with title. Indeed sufficient *doing* may be emblematic of property doctrine, as Oliver Wendell Holmes remarked '[t]he life of the common law has not been logic; it has been experience.'[243] Like Carol Rose's constant yelling of 'this is mine',[244] stewardship requires consistent unequivocal performance.

Lastly, effective citation and constant reiteration requires context, what Blomley terms *assemblage*[245] the physical and human entities that actualize the performance and connect it to the world. Assemblage helps by 'concretizing a new set of discourses around property and space.'[246] Importantly, stewardship performance cannot occur in universalized Blackacres.

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[240] Farrier, above n108.
[241] Caldwell, above n16, part 4.
[242] Blomley,above n39, 18.
[243] Oliver Wendell Holmes cited in Goldstein, above n 412, Terry Frazier, 'The Green Alternative to Classical Liberal Property Theory' (1995-1996) 20 Vt. L. Rev. 302, 53.
[244] Carol Rose, 'Possession as the Origin of Property', (1985) 52(1) *Univ. Chicago Law Rev.* 73.
[245] Blomley, above n39, 21.
[246] During enclosure, hedges used to divide and enclose were the 'assemblage' that created a new property discourse.

5.4 Performative diversity: two micro-examples of stewardship performance

Performances of stewardship frequently involve public, community and private actors collaborating across property boundaries.[247] Similar to the happy coincidence of sustainable communities and property diversity (see chapter 4), 'connective conservation'[248] efforts speak of an intuitive link between property diversity and stewardship. This serendipitous convergence is noted by Sue Farran, and her observations of a contemporary phenomenon in England she calls an 'extraordinary return to the land.'[249] Farran writes of 'people going back to the land… coming together to cultivate land and grow things'[250] in a growing sense of stewardship. These acts occur in diverse spaces; community gardens and orchards, resurgent allotments, city farms, and guerilla gardening plots. Farran asks what this movement means for contemporary property, and concludes that many of these ventures occur outside traditional frameworks, novel arrangements such as 'crop shares and tree leases in community orchards, raised-bed leasing in the community backyards of tenement buildings, land sharing, community farm shares and local food coalitions.'[251] These diverse tenures, in turn, are located across a diversity of property type.

> Some of the manifestations of the phenomenon remain outside or on the edges of the public domain, while others represent or become hybrid public/private relationships with land… [some] forms of engagement may be distinct from and not dependent on ownership.[252]

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[247] Knight & Landres, above n1.
[248] The term is used in the Gondwana Link project that aims to create a corridor of 1000 kilometres in WA's southwest. Administered by not-for-profit company (Gondwana Link Ltd), the project links public agencies with private landowners and community organizations, like Greening Australia, Bush Heritage and local friends groups. It uses combinations of outright purchase and conservation covenants in conjunction with public reserves and national parks to secure the corridor. http://www.gondwanalink.org/index.aspx (30 July 2013).
[249] Sue Farran, 'Earth under the Nails: The Extraordinary Return to the Land' in Nicholas Hopkins (ed.) *Modern Studies in Property Law* (7th ed., 2013).
[250] Ibid, 173.
[251] Ibid, 188.
[252] Ibid, 175, 189.

This 'extraordinary return to the land' can be measured by performance theory. If, as Blomley argues, *real property* is enacted by performances like

> humble acts of fence building, mortgage foreclosures, judicial pronouncements, debates around the use of force in the protection of one's home, burglary, instructions to children not to cross someone else's lawn, the installation of security systems, law review articles, the creation of a cadastre, the cutting of hedges, struggles over gentrification, property registration, indigenous mobilizations, and so on.[253]

equally, stewardship is enacted by Farran's guerilla gardening, community orchard planting, or allotment farming.

Performance theory across the diversity of property is best articulated by concrete examples of 'sustained and citational labour.' This part concludes by examining two place-based micro-studies of good land use. The first typifies conservation efforts in the rangelands of America's West and is the subject of scholarly scrutiny[254]. The other is a simpler, local landcare narrative set in regional Australia. Each enacts cross-boundary stewardship.

Recent land use conflicts in the American west have centered on the clash between commodity and non-commodity uses of publicly owned rangelands, specifically grazing and recreation.[255] Over-grazing has been blamed for land degradation, soil erosion, and damage to riparian systems since the 1880s.[256] Environmentalists want cattle removed from the public domain.[257] Cattle advocates respond that recreation is itself a form of consumptive use. On surrounding private lands, urban growth has fed sprawl and the loss of open space. A collaborative model of land use management has been one response to the polarities of this land use debate.

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[253] Blomley, above n39, 14.
[254] White, above n51.
[255] Courtney White, 'Conservation in the Age of Consequences' (2008) 48 *Nat. Res. J*. 1, 1-3
[256] Samuel Trask Dana & Sally Fairfax, *Forest and Range Policy Its Development in the United States* (2nd ed, 1980).
[257] Denzell & Nancy Ferguson, *Sacred Cows at the Public Trough* (1983); J. Wald et al, *How Not to be Cowed* (1991).

> [P]eople from varied backgrounds have been seeking ways to depolarize environmental issues, reintegrate conservation, and build a new consensus for action. The common denominator is a commitment to land health on the part of individuals, neighborhoods, organizations, tribes, agencies and businesses, and a despite to achieve tangible results, whether on private, public, or community lands. These trends suggest the possibility of an emerging "cross-landscape" constituency that can address the harmful feedback loops that encourage continued degradation of urban, suburban, exurban, rural, and wild lands alike.[258]

The Malpai Borderlands Group in New Mexico and Arizona is representative of this trend, a cross landscape partnership of private owners that act in concert with public agencies to sustainably co-manage the Malpai natural resource region.[259] The Malpai comprises 'more than a million acres of desert grasslands and broken mountains',[260] a mix of private and public lands, the latter including wildlife refuges and public domain leased under grazing permits. The Malpai Borderlands Group (MPG) is a not-for-profit community organization formed in 1994, consisting primarily of local ranchers. The region's centerpiece is Gray Ranch, a 'biologically rich 322,000 acre' property, considered 'one of the most significant ecological landscapes … in private ownership.'[261] Because of its unique ecological values, The Nature Conservancy[262] purchased the Gray in 1990. Its aim was to transfer the holding to federal ownership as a wildlife refuge, but protests at the loss of a 'tax-paying, cowboy hiring'[263] ranch forced a change in strategy. A charitable foundation[264] was formed to purchase the ranch as conservation buyer and working ranch operator. Under new ownership, the Gray Ranch pioneered the concept of 'grassbanks', where rights to graze on its rich grasslands were

[258] Meine, above n1, 61.
[259] Carol Rose, "The Several Futures of Property: OF Cyberspace and Folk Tales, Emission Trades and Ecosystems" (1998) 83 *Minn. L.R* 129, 178; Robert Keiter, "Public Lands and Law Reform: Putting Theory, Policy and Practice in Perspective" (2005) *Utah L. R.* 1127, 1175.
[260] Elmendorf, above n109, 482.
[261] White, above n51, 121.
[262] Brewer, above n16, 185-215.
[263] White, above n51, 121.
[264] The charitable trust established to purchase Gray Ranch is also a member of the Malpai Borderlands Group Inc.

sold to neighboring ranchers in return for open space conservation easements,[265] the remediation of exhausted grazing lands, and publicly funded conservation programs.[266] The MPG owns the conservation easements in its capacity as a land trust.[267] The easements protect 75,000 acres of private land as 'natural wildlife habitat and productive ranch land by preventing subdivision and development.'[268] What had once been a contentious landscape 'transformed quickly into a model of collaboration and conservation,'[269] 'a land of intersecting groups.'[270]

The second example is a micro-urban one in the ecological tradition of localism, historicized by Gilbert White and Henry David Thoreau.[271] Indeed, Nicole Graham describes adaptation to a new property paradigm as a 'process of becoming local.'[272] The Wilson River Landcare Group (WRLG) has rehabilitated the riparian zone adjoining the Wilson River in Lismore, Australia, turning a degraded area of 'debris from past floods, car tyres, old fridges, plastic bags, and cow carcasses' into a riverbank gallery rainforest on both sides of the river.[273] The volunteer WLRG was formed in 1993 and initially commenced reforestation works on private lands to the north and south of urban areas. The group's heartland is now a series of re-vegetated public parklands adjoining the river, and private flood prone land. WRLG's networks extend to Aboriginal, community and private landowners, as well as councils and schools. Apart from restoration of the native rainforest, the

[265] The conservation easements are vested in the not for profit Malpai Borderlands Group, and preclude subdivision, and urban development.
[266] Such as "cool fire" burning that encourages native vegetative cover, or restoration of native grassland and savanna habitat. See http://www.malpaiborderlandsgroup.org/about.asp.
[267] Land trusts are often described in a physicalized way. "Land trust projects are place-based, connected to a piece of the Earth rather than being abstract or abstruse… If we set up a new preserve, we can hike it, bird it, hug the trees, and wade in the water." Brewer, 12.
[268] http://www.malpaiborderlandsgroup.org/about.asp.
[269] White, above n51, 122
[270] Elmendorf, above n109, 483.
[271] Worster attributes much of the intellectual force of modern ecological thinking to White who lived in the 18th century village of Selborne, Hampshire, and Thoreau, who lived in 19th century Concord village, Massachusetts. Donald Worster, *Nature's Economy A History of Ecological Ideas* (2nd ed, 1994).
[272] Graham, above n3.
[273] "The earliest explorers could hardly see the sky when travelling up the river in boats…the vines and treetops touched overhead. The river was narrower before they took the trees away and the water was clear, they could see to the bottom." Jennie Dell, "Planting seeds of regeneration" *Northern Rivers Echo* (Lismore) 24 May 2012, 6-7.

group has removed weeds, stabilized eroded riverbanks, and improved water quality. The group hopes its actions 'in urban Lismore inspire landholders upstream to plant trees too…. ultimately we plant out of love for our amazing river.'[274]

These vignettes affirm Joseph Sax's prediction that '[v]iewing land through the lens of an economy of nature reduces the significance of property lines….' .[275] Stewards tend to look less at the artifice of demarcation, and more at the land in between and across the lines. They see nature as an unfragmented whole, in WRLG's case 'a globally significant biodiversity hotspot', not 'distinct parcels of land and discrete natural resources valued piece by piece.'[276] And it matters less whether the 'landowners' are private entities, public agencies, or a community group. From the steward's perspective, Joseph Singer's 'castle' is less plausible. This is an insight into a 'different way of thinking about what ownership entails.'[277]

The performances of stewardship gleaned from these two examples are as diverse as Blomley's earlier acts of real property - re-planting rainforest trees, cleaning flood debris, swimming in clear rivers, lighting cool fires, negotiating conservation easements, preserving rural ways of life, or trading grassbank-grazing offsets. Blomley's notion of performativity directs us to the important question: what sort of property in land do we wish to see performed? Is it one fixated on individual property rights absent context, or one where many diverse rights and obligation sit together? These performances, by diverse owners across the boundaries of property type, suggest by their repetitive and successful doing that stewardship is a vibrant concept intimately connected to the diversity of our many relationships with land.

[274] Ibid.
[275] Sax, above n193.
[276] Freyfogle, above n8, 13.
[277] Joseph Sax, *Ownership, Property and Sustainability 2010 Wallace Stegner Lecture* (2010) 9.

6. Conclusion

Parts 2, 3 and 4 of this chapter argue that the private ownership model impedes the generation of obligation as a corollary of property right in land. By contrast, part 5 describes how *property diversity* yields a vista where private, public, and community performances of good land use occur *in situ*, where a conceptual framework measures the impact of land uses, and an array of property values dilute one-sided norms that otherwise make harmful externalities 'magically disappear.'

Atomistic conceptions of property in land make it 'hard to spot and appreciate the connections when all we see are the pieces.'[278] In contrast to this singular vision, property diversity shifts landed patterns away from compartmentalized artifice to holistic interconnectedness; a re-sighting of property in land where generating obligation alongside right somehow seems less 'awkward.'

[278] Freyfogle, above n8, 30-1

Chapter 6 Community and the Implications of Property Diversity in Land

1. Introduction

In 1984, Joseph Sax identified community as the missing blank in American law. 'The notion of community entitlement is virtually empty space in the legal constellation…. there isn't even an accepted or commonplace legal definition of community.'[1] Twenty-six years later, despite intermittent filling of that space, Sax sees little change, noting that 'almost every conception of land in modern times has ignored community values.'[2] Sax's observations highlight the dilemma of reconciling community and property in land, a challenge with existential and normative implications.[3] This chapter examines the marginalized links between property and community, a subject matter 'left unexplored within property scholarship,[4] and asks whether *property diversity* may present some answers to that dilemma. For as Sax also says '[d]iversity is a good thing, in human settlements as well as nature. Or, to put it another way, eclecticism is not a bad thing.'[5]

Part 2 commences by exploring definitions of the term 'community' within property and geography scholarship. Part 3 then outlines legal theories that variously 'explain and evaluate the interaction between property and community.'[6] Other disciplinary insights into this relationship, principally the work of legal geographer Nicholas Blomley, form the basis of part 4. Part 5 is the concluding cornerstone of this chapter, it analyses the reasons why

[1] Joseph Sax, 'The Rights of Communities: A Blank Space in American Law', July 11, 1984, Natural Resources Law Center, University of Colorado, School of Law.
[2] Joseph Sax, 'Ownership, Property and Sustainability' 2010 Wallace Stegner Lecture, 13.
[3] By existential, I mean formal legal status. 'The interests of a community have no formal status; they are not, for example, property rights. In the law's eye, they are only sentiment.' Joseph Sax, 'Do Communities Have Rights? The National Parks as Laboratories of New Ideas' (1984) 45 *University of Pittsburgh LR* 499, 506. By normative, I mean the values of community.
[4] Gregory Alexander & Eduardo Penalver , 'Introduction' in G Alexander & E Penalver (eds.) *Property and Community* (2010) xxxiii. The authors add, '[m]oreover the dominant approaches within legal theory are poorly suited to the task of explaining and evaluating the interaction between property and community.'
[5] Sax, above n3, 509.
[6] Alexander & Penalver above n4, xxxiii.

property, in particular *property diversity*, is relevant to community. It argues that property and community are closely linked,[7] however much their intimacy is obscured by a liberal polarity focused on either the state or the private individual. Curiously, this binary paradigm does not reflect the propertied truth of our human landscapes. By contrast, property diversity better approximates the communities in which we live. It 'unsettles' dominant assumptions of private uniformity,[8] enlivens Joseph Sax's eclectic, and connects people to community. It fulfills the promise envisaged by Eduardo Penalver, whereby property becomes an 'entrance' to rather than 'exit' from community.[9]

2. What is 'community'?

'Community' is a contested term that is 'maddeningly ambiguous',[10] a 'fluid, often elusive concept.'[11] While it is no longer as 'empty' a legal space as Sax described in 1984, it remains uncomfortable territory for property scholars. This part 2 is a chronological and inter-disciplinary journey, examining in turn property and geography scholarship to describe the complex meanings of 'community'.

2.1 Community in property scholarship

Joseph Sax's innovative study[12] of the fate of several 'viable farming villages' in an Arkansas national park was a 'provocative point of beginning for thinking about the substance of community interests.'[13] Sax chose to define community as an aggregate of attributes. Using these villages as exemplars, Sax identifies 'distinctiveness, stability, a strong association of people with the landscape, [and the] maintenance of traditions and historical structures'[14] to inform the meaning of community. Sax in particular emphasizes two factors;

[7] These links are 'deeply intertwined.' Ibid, xxxiii
[8] Nicholas Blomley, *Unsettling the City Urban Land and the Politics of Property* (2004), 156.
[9] Eduardo Penalver, 'Property as Entrance', (2005) *Virginia Law Review* 1889.
[10] Alexander & Penalver, above n4, xxix.
[11] Amnon Lehavi, 'Property Rights and Local Public Goods: Toward a Better Future for Urban Communities', (2004) 36 *The Urban Lawyer* 1, 45.
[12] Sax above n1 & 3.
[13] Sax, above n3, 503.
[14] Ibid.

distinctive diversity, and *authenticity*. *Distinctiveness* is discerned by posing questions such as

> Is there a distinctive local lifestyle? Is there an indigenous architecture or a special flavor to the local economy? Is there a population that has generated some distinctive ties to the land, by continuity or by some special relation, that bind them to each other and to the place? Are the local interests internally rather than externally generated?[15]

Authenticity is an innate and subjectively intuitive quality, 'the genius of a place' that gives locations vitality. Humanist geographers such as Edward Relph[16] write of the importance (and increasing disappearance) of authenticity of place. Authenticity is an organic measure, an amorphous quality generated from within, as contrasted to the confected indicia of 'community' imposed from without.[17]

Few directly took up Sax's 'provocative' invitation. In the ensuing years, there was a widespread perception that 'scholarly attempts to define and conceptualize "community"' was futile.'[18] Certain scholarship focused on the dynamics of community norms, thereby defining 'community' obliquely in terms of its normative effects. Robert Ellickson viewed 'community' through the prism of a small, homogenous group of ranchers in rural Shasta County, California, and the powerful effect of their insider norms maintaining a communal 'order without law.'[19] Ellickson observes that norms lose potency when strangers intervene, or the community becomes diffuse or heterogeneous.[20] Implicit in this oblique perspective on community is an 'us and them' logic, what Alexander and Penalver call the 'insider/outsider dilemma', the necessity by implication to exclude outsiders in the process of

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[15] Sax above n3, 509.
[16] Tim Cresswell, *Place A Short Introduction (*2004).
[17] Sax argues that authentic communities should not be viewed as museum pieces, and need to adapt to changing circumstances. Cf 'totem objects designed to convince us that we live in a thing called *community*.' James Kunstler, *The Geography of Nowhere* (1993) 123.
[18] Lehavi, above n11, 46.
[19] Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991) 167.
[20] David Engel, 'The Oven Bird's Song, Insiders, Outsiders and Personal Injuries in an American Community' in Carol Greenhouse et al (eds.), *Law and Community in Three American Towns,* (1994) 51-2.

constituting and defining a community.[21] Hanoch Dagan similarly recognizes that 'some measure of practical or symbolic exclusion' is necessary to define communities, which are 'demarcated from broader society.'[22] Such 'logic' has positive and negative impacts, inclusive for those within the group, but alienating for those without. The negative consequences of exclusion are discussed later.

For the remainder of the 20th century, property scholars continued to struggle with 'community'. In 1992, Stephen Gardbaum's study of law, politics, and the claims of community, studiously avoided property.[23] Two years later, Richard Ford claimed that defining 'community' was an exercise in tautology, that there was 'no self-conscious legal conception of political space.'[24] Ford attributed the irrelevance of the 'development, population and demarcation' of decentralized space to a binary liberal worldview that analogized community as either 'the product of aggregated individual choices or the administratively necessary segmentation of centralized governmental power.'[25]

In the 21st century, a shift occurred, particularly with the emergence of progressive property theorists who argued that this binary view failed to account for property's 'truth'. In 2009, Gregory Alexander, Eduardo Penalver, Laura Underkuffler and Joseph Singer summarized this evolving approach in a five-point 'Statement of Progressive Property'.[26] In a significant departure from orthodoxy,[27] this 'pluralistic and incommensurable' conception of property places community as a key pillar. Their fifth point states

> Property enables and shapes community life. Property law can render relationships within communities either exploitative and humiliating or

[21] Alexander & Penalver, above n4, xxix-xxx.
[22] Hanoch Dagan, 'The Public Dimension of Private Property' (2012) 30-1 http://ssrn.com/abstract=2045487.
[23] Stephen Gardbaum. 'Law, Politics, and the Claims of Community' (1992) 90 *Michigan Law Rev.* 685.
[24] Richard Ford, 'The Boundaries of Race: Political Geography in Legal Analysis (1994) 107 *Harvard Law Review* 1857, 1857- 1860.
[25] Ibid, 1857.
[26] Gregory Alexander et al, 'A Statement of Progressive Property', (2009) 94 *Cornell Law Review* 743.
[27] Described as the 'ownership model', or the law and economics theory of property.

> liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society.[28]

Progressive theorists reject the view that community is simply an agglomeration of individuals.[29] Rather, it is a discrete and 'intentionally capacious' concept.[30] Alexander sees community as primarily social, a 'mediating vehicle' through which humans become socialized.[31] Community has multiple forms that shatter the binary view.[32] It is rarely unitary, but a complex network of communities that 'interpenetrate one another so completely that they cannot be fully separated.'[33] Progressive theorists are also insistent in their rejection of the liberal view that individuals are free to voluntarily exit community. While communities are groups we may join, usually membership is involuntary; they are groups we find ourselves in. Involuntariness is important to progressive theory, individual property owners rarely exit community effortlessly either because of coercive communal norms, or high exit costs.[34] 'Property is an institution that binds people together in … communities'[35] irrespective of individual choice. Liberal exit without consequence is its antithesis.

While sympathetic to progressive theory, Amnon Lehavi rejects its broad understandings of 'community' as 'vague, [and] over-inclusive'.[36] Instead, Lehavi devises three categories of community; intentional, planned, and spontaneous. Intentional communities typically comprise groups with shared ideologies, values or beliefs distinctive from the mainstream.[37] They are 'characterized by strong internal norms… that have sweeping effects on the

[28] Alexander et al, above n26, 744.
[29] Gregory Alexander & Eduardo Penalver, 'Properties of Community' (2009) 10 *Theoretical Inquiries in Law* 127, 129.
[30] Ibid.
[31] Gregory Alexander, The Social-Obligation Norm in American Law' (2009) 94 *Cornell Law Review* 745, 766. 'Communities foster just relations with societies by shaping social norms, not simply individual interests.' Ibid, 767.
[32] Ibid, 766-7.
[33] Ibid, 767.
[34] In the US in 2000 'renters changed residence at nearly four times the rate of homeowners.' Penalver, above n9, 1948-9.
[35] Ibid, 1972.
[36] Amnon Lehavi, 'How Property Can Create, Maintain, or Destroy Community (2009) 10 *Intellectual Inquiries in Law* 43, 76.
[37] Lehavi uses the example of Israeli Kibbutzim.

lives of … members, and a consequent necessity for a certain level of … insulation from society's norms and institutions in order for such communities to survive.'[38] Importantly, intentional communities do not arise because property structures make them easier or economically feasible. By contrast, planned communities are often 'green field' residential communities; where there is little common interest between putative members, and property structures facilitate ease of incorporation and ongoing enforcement of community rules.[39] Spontaneous communities arise from existing established groupings, what Lehavi calls 'groups of physically-adjacent residents who live in "regular" neighborhoods [who] cooperate and coordinate over time, and in the process create a meaningful, enduring basis for localized communality.'[40] Lehavi cites communities that arise to protect public spaces under threat ('friends of' groups) as an example of this third category. Lehavi's taxonomy is designed to better analyze the connections between community and property. For example, while property rules provide significant 'tailwind' for planned communities, they may be neutral for intentional communities, and offer disadvantageous 'headwinds' for spontaneous communities.[41] Property may ultimately create, maintain or undermine community.[42]

2.2 Community in geography scholarship

The comparative insight of geographers into the question of what is 'place' is a useful counterpoint to property scholarship. But like community, 'place' for geographers is a 'slippery concept.'[43] Overwhelmingly, 'place' is defined by its human meanings. It possesses two aspects, its material and visual form(s), and its 'relationship to humans, … the human capacity to produce and consume meaning.'[44] Place without human meaning is simply *space*; mere physical location subsidiary to intangible social investments. Edward

[38] Lehavi, above n, 36.
[39] By covenants, rules, and restrictions (CRR) frequently seen in strata schemes.
[40] Lehavi, above n, 36.
[41] Ibid, 65- 75.
[42] Cf Alison Brown, 'Crofter Forestry, Land Reform and the Ideology of Community', (2008) 17(3) *Social & Legal Studies* 333, 335.
[43] Nicholas Blomley, *Law, Space, and the Geographies of Power* (1994) 112.
[44] Cresswell, above n16, 10.

Relph gives examples of these human meanings: 'visuality, the sense of community that place engenders, the sense of time involved in establishing attachment to place, and the value of rootedness'.[45] Penny English speaks of locales where 'people's life histories are threaded.'[46] Yi-Fu Tuan likens place to a 'calm center of established values', 'enclosed and humanized' compared to the freedom and openness of space.[47]

Nicholas Blomley's *Law, Space, and the Geographies of Power* in 1994 was a groundbreaking work in the emerging discipline of legal geography, the study of the links between property and geography.[48] Blomley unpacked 'place' into *location, locales*, and *sense of place.*

> *Location* refers to the relative position of any place in relation to other places. *Locale* conversely treats the place from within as a specific site in which social relations are bounded and locally constituted. *Sense of place* refers to the experiential and representational map constructed of a specific place by its occupants.[49]

Location defines a community externally (vis-à-vis other communities), while *locale* defines it internally, as a physicalized, identifiable place invested with individual and collective meaning for its members. Its social aspects or *sense of place* describe the diverse relationships, connections, and norms that are necessarily intangible and aspatial. Sense of place is critical to understanding the fullness of community, that 'territorially based groups of people share some … common denominator beyond mere proximity',[50] 'shared values, participation in a shared way of life, identification with the group, mutual recognition'[51] or a strong connection to a particular locality that enables it to

[45] Ibid, 22.
[46] Ibid, 465-6.
[47] Yi-Fu Tuan, *Space and Place The Perspective of Experience*, (1977) 54, 183-4.
[48] Jane Holder & Carolyn Harrison, Connecting Law and Geography in J Holder & C. Harrison (eds.) *Law and Geography* (2002). Blomley's scholarship is described as 'agenda-setting' in a 2014 historical review of legal geography, 'Introduction Expanding the Spaces of Law' in Irus Braverman et al (eds.) *The Expanding Spaces of Law: A Timely Legal Geography* (2014) 5.
[49] Blomley, above n43.
[50] Lehavi, above n11.
[51] Andrew Mason, *Community, Solidarity and Belonging: Levels of Community and their Normative Significance* (2000) 19-25.

become a ‘site of social solidarity.’[52]

James Kunstler sees community in similar spatial and aspatial terms. ‘[Community] is a living organism based on a web of interdependencies-… a local economy. It expresses itself physically as connectedness, as buildings actively relating to one another, and to whatever public space exists, be it the street, the courthouse square, or the village green.’[53] Interestingly, Kunstler observes the significance of property to community, in particular the interaction of private and public lands.

2.3 Community is exclusionary

In defining community, it is cautionary not to overlook its negatives. Blomley warns that ‘we should not over-romanticize or essentialize the local community. Small towns and villages can be stifling or oppressive places… [G]ood or bad, such local sites are one vital means by which we acquire a sense of identity.’[54] Similarly, Amnon Lehavi identifies ‘animosity, xenophobia and intolerance’[55] as adverse communitarian characteristics. This inherently exclusionary nature of community informs its brutal side, an unpleasant consequence of an existential imperative to keep ‘outsiders’ out. For Jeremy Waldron, this characteristic is all consuming

> "True community" in the sense of "actually-existing community" - a real entity actually structured by a communitarian -is not always as nice as it looks. Actually existing communities are often exclusionary and inauthentic… Moreover I fear that this is not an aberration, but that these aspects of community -its exclusiveness and its ability to sustain collective illusions about the quality of social life - are precisely what is valued when self-styled "communitarian" claims are put forward in law and politics. It has come to the point where further objections to this tendency in the name of "true" community

[52] Avatil Margalit, ‘You’ll Never Walk Alone: On Property, Community and Football Fans’ (2009) 10 *Intellectual Inquiries in Law* 217, 223. This interpretation is also problematic for geographers because it synonymizes ‘place’ with ‘community. Doreen Massey cited in Cresswell, above n16.
[53] Kunstler, above n17, 185-6.
[54] Blomley, 220.
[55] Lehavi, above n36, 47.

may be futile, and where "inclusive community" might have to be regarded as an oxymoron.[56]

This chapter restricts itself to territorial communities, physically bounded *locations* and *locales*. This interpretation ignores the phenomenon of non-territorial communities.[57] It does so because the interaction between property in land and community is its primary analytical focus.[58] Its analogizing of 'place' and 'community' is likewise a useful contrivance in drawing on the legitimate cross-disciplinary overlap of property and legal geography scholarship. Each shares in common a concept of 'community' that is bounded spatially but boundless socially. [59]

In sum, community is a capacious and complex concept, one that modern property struggles to explain. In seeking answers to this conundrum, part 3 examines property's theoretical treatment of 'community'.

3. Legal theories of property and community

As part 2 intimates, the notion of community is not a mainstream concern of modern property scholarship. That it is largely 'unexplored' is chiefly attributed to a dominant paradigm at worst hostile, or at best indifferent, to the interposition of a decentralized entity between the autonomous individual and the centralized state. Recent scholarship that links community and property reflects a fraying of that 'central logic.'[60]

[56] Jeremy Waldron, 'Community and Property: For Those Who Have Neither', (2009) 10 *Theoretical Inquiries in Law* 161, 189.
[57] 'Communities can exist without being in the same place', Cresswell above n16, 68. 'Fandoms' of football clubs are a community, Margalit, above n52; Cf Penalver's view that geography does matter to communities, Penalver, above n9.
[58] Lehavi focuses on 'territorial communities' because 'physical proximity facilitates closer interpersonal ties and repeat-play encounters, [and] reveals broader social patterns, and their powerful practical and symbolic societal effects', Lehavi, above 36, 49.
[59] See for example J.K. Gibson-Graham, 'Surplus Possibilities: Postdevelopment and Community Economies', (2005) 26 *Singapore Journal of Tropical Geography* 4, 16.
[60] A J van der Walt, The Marginality of Property; in Alexander & Penalver, above n4; Margaret Davies, *Property Meanings, histories, theories* (2007) 115-138.

The consequences of community's marginalization are existential and normative. Community's existential dilemma has negative implications for its self-definition as a legal concept. It also has implications for its rights-status and legal standing, whether interpreted narrowly as the discrete rights of a specific community, or more broadly as collective rights asserted by individuals who group-identify as community. Community's normative dilemma is in part a corollary of its existential one. Yet, as Alexander and Penalver observe, irrespective of legal status, 'community has a moral status that is distinct from those of neighboring owners or nonowning individuals.'[61]

This part examines those legal theories and theorists that seek to explain (or not) the interaction of community and property. It situates them on a continuum, represented at one extreme by a view that community does not exist, rendering any interaction with property impossible, and at the other, by a view that community and property are intimately intertwined. At some indeterminate point on this spectrum, community also shifts from being an entity external to property, to an entity so immersed within the institution that it is no longer extricable. Identifying that moment of crossover is difficult given its opacity and deep implication.

3.1 The liberal perspective

For some neo-liberals, community as an entity does not exist. As Robert Nozick argues, '[t]here are only individual people, different individual people, with their own individual lives…. nothing more.'[62] This ideological hostility to community reflects its failure to fit 'neatly into liberal theory which sought to allocate all aspects of social life [including property] to one of the poles of its dualities…either to the sphere of the state or to… the free interaction of individuals within civil society.'[63] To the extent that community is 'seen' at all,

[61] Alexander & Penalver, above n4, xviii
[62] Waldron, above n56, 168.
[63] Gerald Frug, 'City as a Legal Concept', (1980) 93 *Harvard Law Review* 1057, 1076. 'The evolution of liberalism can thus be understood as an undermining of the vitality of all groups that had held an intermediate position between what we now think of as the sphere of the individual and that of the state.' Ibid, 1087.

it is viewed with deep suspicion in its capacity as an outlier agency of the regulatory state.[64]

Yet the liberal paradigm is not a monolith. Some liberal theories acknowledge a conception of community, albeit as a mere or inadvertent consequence of individual choice, personal preference, or welfare maximization. This pale version of community is both a by-product and backdrop to rational actors voluntarily entering into, or exiting out of, associations of individuals. Importantly under this view, community is not an end in itself, but has value 'only to the extent that [it] conform[s] to the individual-state dualism.'[65]

Alexander and Penalver identify *utilitarianism* and *contractarianism* as liberal theories with limited community resonance. Under utilitarian theory,[66] the satisfaction of individual preference is the ultimate end. Any '[u]tilitarian analysis of community is refracted through this maximizing lens.'[67] The result is that community is instrumental; its value lies only in the extent to which it contributes to the satisfaction of an individual's preferences. Critical is a freedom to enter and exit communities at will, since individuals know best what satisfies their individual preferences, and as such, must be free to choose the communities into which they will enter or leave.[68] This transforms 'the relationship between local communities and their potential residents [into] a competitive market in which individual preferences are more likely to be satisfied, than in an alternative in which individuals lack the ability to "vote with their feet"'.[69] Utilitarian community is thus an unrestricted, market-driven exercise. Eduardo Penalver describes the relationship of property to community in this model as one of 'property as exit', an inalienable freedom of self-sufficient individuals to enter and exit community without constraint. Exit 'eviscerates community' in that it weakens its ability to demand the carrying

[64] Ibid, 1076.
[65] Blomley, above n8, 77.
[66] The law and economics approach is its most prominent contemporary exemplar, Alexander & Penalver, above n4, xviii.
[67] Ibid, xviii.
[68] Robert Ellickson, 'Cities and Homeowners Associations' (1982) 130 *University of Pennsylvania Law Review* 1519.
[69] Alexander & Penalver, above n4, xix-xx. The idea of households 'moving with their feet' to more enticing communities is attributed to Charles Tiebout. Ellickson, above n68, 1547-54.

out of 'unpleasant tasks or [to] maintain internal disciple,' simply because individuals 'hold all the cards'.[70] Community under the exit paradigm is optional, and is viewed with constant suspicion as 'a potential threat to an individual's negative liberty.'[71]

The liberal contractarian[72] conception of community is thicker in that it takes 'the idea of belonging in a community seriously.' [73] Individuals agree to enter into communities, sometimes by overt choice, but more typically as a matter of implication.[74]

> [T]he relationship between the self and communities is both contractual and welfarist. The self and communities are bound together by mutual agreement, sometimes express but commonly implied, to associate with each other to pursue some shared end.[75]

In 'choosing' to associate as a community, there is often a happy convergence of common and individual goods. 'With convergent goods, individuals interact in pursuit of individually defined ends that happen to overlap with the ends pursued by others. [Yet still] the goods are not constitutive of the group, or the community.'[76] The core premise of liberal contractarianism remains the primacy of the autonomous individual,[77] such that community persists as a collective consequence of individual preferences. Its conception of community is thicker for two key reasons; the idea of longer-term reciprocity, and its rejection of a monistic account of property.

Under contractarian theory, an individual is never expected to make an uncompensated sacrifice for the community, since to sacrifice is to controvert

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[70] Penalver, above n9, 1955.
[71] Ibid, 1900.
[72] Contractarianism remains liberal since the 'individual stands ontologically prior to the community.' Alexander & Penalver, above n4, xxii.
[73] Alexander, above n31, 758.
[74] Alexander & Penalver describe such contracts as 'actual agreements or hypothetical bargains.' Above n4, xxii.
[75] Alexander, above n31, 759-60.
[76] Ibid.
[77] Ibid, 759.

the basic premise of personal autonomy, 'self-effacement.'[78] However the compensation need not be immediate, it may be 'repaid' over the longer term. 'To expect individuals to make personal sacrifices for the common good is legitimate just insofar as accounts will even up in the long run, that is, so long as reasonable grounds exist to believe that the total long-term burdens that the individual bears will balance out the total long-term benefits she receives.'[79] Hanoch Dagan views the social responsibility of property ownership as one of 'long-term reciprocity', not one of 'utopian noncommodification.'[80] 'Long term reciprocity urges us to adhere to our plural and ambivalent understandings of membership [of community] as both a source of mutual advantage and a locus of belonging.'[81] Dagan believes that long-term reciprocity is most sustained in smaller local communities, where 'our status as landowners also defines our membership.'[82] Dagan's 'socially responsible ownership' is further along the continuum because it recognizes the longer-term nature of individual 'investments' in community, and because it strives to socialize an erstwhile liberal preoccupation with autonomous individualism. Importantly, it also sees the links between land ownership and community, and recognizes that a monistic view of property yields an incomplete and unsatisfactory account of community.

> Essentializing property as an exclusive right expresses and reinforces a culture of alienation that underplays the significance of belonging to a community, and perceives our membership therein in purely instrumental terms…. This approach defines our obligations qua citizens and qua community members as "exchanges for monetizable gains", and thus commodifies both our citizenship and our membership in local communities. [Yet] the impersonality of market relations is not inherently wrong… by facilitating dealings on an explicit quid pro quo basis, the market defines an important sphere of freedom from personal ties and obligations. A responsible conception of property can and should appreciate these virtues of the market norms…. at the same time it should

[78] Hanoch Dagan, 'The Craft of Property' (2003) 91 *California Law Rev.* 1517; Gregory Alexander & Hanoch Dagan, *Properties of Property* (2012).
[79] Alexander, above n31, 760.
[80] Hanoch Dagan, 'The Social Responsibility of Ownership' (2007) 92 *Cornell Law Review* 1255, 1266.
[81] Hanoch Dagan, 'Takings and Distributive Justice' (1999) 85 *Virginia Law Review* 741, 773.
[82] Ibid, 774.

avoid allowing these norms to override those of the other spheres of society.[83]

3.2 The interface of property norms and community

Another perspective on 'property and community' is provided by the study of community norms and the contours of property. This scholarship sees community as a dynamic force, a tectonic-like plate that ceaselessly impacts on the content and boundaries of property rights. The intimacy inherent to this constant interaction pushes ever closer to the crossover point where community and property converge, where the colliding plates become an undifferentiated amalgam. This can be seen when the values of community become the values of property. For example, Hanoch Dagan citing the heterogeneous reality of property identifies a number of property values, including autonomy, personhood, utility, and c*ommunity*.[84] Joseph Singer and Kevin Gray, amongst others,[85] have written widely on the relationship between community norms and property. Their scholarship reveals a fleeting 'snapshot' of community; seen in the imprint it leaves on the contours of an owner's property rights. Their theoretical perspective is *formative*; community norms define the parameters of property rights; they presume the rightful 'owners' of property entitlements, the legitimacy of their entitlements, and the effects of any externalities (harmful or self-regarding).

As discussed in chapter 5, Joe Singer proposes that a community's 'property norms' construct the externalities of property ownership.[86] Property norms are 'standards that help allocate and define the legitimate interests of persons with respect to control of valued resources.'[87] They 'orient us in a moral universe',[88] by indicating first who is the owner, or nonowner, of a particular

[83] Hanoch Dagan, *Property Values and Institutions* (2011) 45.
[84] Ibid, 46-7. Elsewhere Dagan writes that ' a responsible conception of property can and should appreciate … virtues of the market norms, but should still avoid allowing these norms to override those of the other spheres of society.' Dagan, above n 80, 1260.
[85] Other communities where norms inform property rights include surfers, Daniel Nazer; ranchers, Robert Ellickson; or university campus food cart owners, Gregory Duhl.
[86] Joseph Singer, 'Property Norms Construct the Externalities of Ownership' in Alexander & Penalver, above n4.
[87] Ibid, 65.
[88] Ibid, 66.

resource, and second, the extent to which that owner must consider the effect an exercise of a property right has on others, the *externalities* of property ownership.[89] Certain externalities are harmful and invasive of other's legitimate property rights; others are non-intrusive and 'self-regarding.' Property norms also work to reveal and obscure the presence of externalities, by deciding what property interests are legitimate, and therefore worthy of protection, and which are not. Critically the legitimacy of *legally relevant interests* depends on 'the values underlying the [claimed property entitlement] and the context in which the claim is asserted.'[90] Where community property norms obscure externalities, they either determine one of the competing entitlements is a core aspect of ownership, or deem the other entitlement unworthy of protection. They thus hide the impact that an exercise of a property right has on others. 'When norms function in these ways, and we view an action as a self-regarding act, externalities magically vanish.'[91] There are qualifications on the extent to which an exercise of a property right can be self-regarding. Singer's democratic estates thesis[92] argues that an externality cannot be incompatible with the social and political norms of a free and democratic community. The effect of the exercise of property rights on others should conform at a minimum to a democratic expectation that people treat each other with 'equal concern and respect.'[93]

Kevin Gray's 'community' is the random grouping of individuals who join a queue. 'The queue is a self-help community, united both in its movement toward a common goal, and in a shared commitment to make the environment of the waiting line…more bearable.'[94] Social norms regulate the practice of queuing; such as entitlements of order, sanctions against pushing in, excusing temporary 'time out' absences, or permitting the trading of places. An individual queuer's proprietary entitlement is one based on time and place.

[89] Externalities are defined as 'effects on others not directly involved in a transaction or act.' Ibid, 61.
[90] Ibid, 77.
[91] Ibid, 79.
[92] Joseph Singer, 'Democratic Estates: Property Law in a Free and Democratic Society', (2009) 94 *Cornell Law Review* 1009.
[93] Ibid 1047.
[94] Kevin Gray, 'Property in a Queue' in Alexander & Penalver, above n4, 192.

Gray likens place in a queue to a 'mobile estate' in land, which derives its primary strength from effluxion of time. A queuer has 'a time-related and time-generated status or "estate" that can be asserted against the rest of the world except those ahead in the queue.' While Gray's observations are consistent with *external* norms influencing the content of property 'rights', they also go further, speaking to a coalescence of (private) property and community.

> In the interdependency of the queue, rights are inseparable from responsibilities. Entitlement and obligation stand hand in hand, in the waiting line… It is indeed this network of reciprocal duty that marks out all forms of moral community…. The private property of each queuer mutates, subtly and indistinguishably, into a community property of peace, order and good government.[95]

Singer and Gray are largely optimistic about the beneficial values of community on property. This optimism aligns with other scholars who write of the aspirational effect of community on property. Margaret Davies' desire for a 'more modern relational understanding of property,' is one that 'concerns individuals *and* communities: how they are formed, how they live together, and how they use their resources.'[96] Eric Freyfogle's hope for property is one that is 'back to the future', a 'community, or ecological vision that … protects lands and communities while encouraging lasting ties between people and places.'[97] Elsewhere, Freyfogle advocates for context and connectivity across the disciplines of property, ecology, and ethics, under the banner of 'Back Toward Community.'[98]

3.3 The progressive perspective

Progressive property theorists are located across the divide on the property and community spectrum. For progressive property, community is center-stage. Indeed property and community are so intertwined that they cannot be

[95] Ibid, 192.
[96] Davies, above n60, 2.
[97] Eric Freyfogle, *The Land We Share: Private Property and the Common Good* (2003) 133.
[98] Eric Freyfogle, *Agrarianism and the Good Society Land, Culture, Conflict, and Hope (*2007) 108.

separated. Gregory Alexander's 'sorely under-theorized'[99] social-obligation norm depends on a commitment to human flourishing within viable communities, places where an individual's capacity to become fully socialized is enabled. [100] Property exists not only to serve values such as 'individual freedom or cost-minimization', but also to support 'communities that enable us to live well-lived lives.'[101] Human flourishing is based on an 'ontological conception of community that views the individual and community as mutually dependent.'[102]

The connections between human flourishing, community, and property are (like progressive property) 'pluralistic and incommensurable'. Their inter-connectivity is such that each constitutive element becomes inextricably dependent on, and bound to the other. *Human flourishing* requires a socially situated individual 'to do well and to fare well.'[103] Flourishing is a well-lived life 'that conforms to…objectively valuable patterns of human existence and interaction.'[104] The perspective of the flourishing individual is relational and inter-dependent.

> Flourishing is an unavoidably cooperative endeavor rather than an individual pursuit or purely personal project. Our ability to flourish requires certain basic material goods and a communal infrastructure… However much we value our personal independence, it is quite literally impossible for a person to flourish without others.[105]

Community[106] enhances human flourishing in two ways; first where it provides a viable level of social infrastructure, and second where it facilitates those conditions that nurture the fullest development of an individual's personal

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[99] Alexander, above n31, 745.
[100] 'Community is constitutive of human flourishing in a very deep sense', Ibid, 818.
[101] Ibid.
[102] Alexander & Penalver, 'Properties of Community', (2009) 10 *Theoretical Inquiries in Law*, 127, 129.
[103] Gregory Alexander & Eduardo Penalver, *An Introduction to Property Theory*, (2012) 87-8.
[104] Alexander & Penalver, above n,102, 136. The 'capabilities of a well-lived life include life, freedom, practical reason, and sociality, 'Ibid, 138.
[105] Alexander & Penalver, above n103, 87.
[106] Progressive theory rejects the view that community is an agglomeration of individuals, Ibid, 129.

capabilities essential to their own socialization. Community and individuals can never be fully separated.

> [A]s free, rational persons, we never cease to operate within and depend upon the matrix of the many communities in which we find ourselves in association. Each of our identities is inextricably connected in some sense with others with whom we are bound as members of one or typically more communities. Each of our identities is literally constituted by the communities of which we are members. Asked who we are, we inevitably talk about the communities where we were born and raised...[107]

The centrality of obligation to *property* (arising from its inherently relational nature in progressive theory[108]) is the final interlocking piece in this jigsaw. Property owners are obliged 'to contribute… resources, or to share …property in order to sustain th[e] social matrices'[109] that make human flourishing possible. In small communities, the contribution may be voluntary or co-operative, but in larger communities, some redistributive mechanism is required to fund adequate social infrastructure. In sum, the 'essential obligations [of property]… are to belong, to participate, and to contribute'[110] to community. Alexander suggests a number of bases for obligation to others in community, including a human need as social animals, long-term self-interest, the dependence to support social networks that arises from membership of a community, or a rational acknowledgement of the universality or mutuality of a community of rights, along the lines of 'if I value my own flourishing, then I must value the flourishing of others as well.' [111]

Penalver's 'property as entrance'[112] thesis is an insightful contribution to property and community obligation in the progressive tradition. In contradistinction to 'property as exit', 'property as entrance' sees individuals

[107] Ibid, 140.
[108] Alexander & Penalver, above n 103, 94-5; Alexander, above n31, 747-8.
[109] Alexander & Penalver, above n 103, 95. In the case of private property, 'special obligations accompany private ownership of those aspects of a society's infrastructure upon which the civic culture depends.' Ibid, 182.
[110] Alexander & Penalver, above n 102, 144.
[111] Alexander, above n31, 769.
[112] Penalver, above n9.

as inherently social,[113]and highlights an 'overlooked' notion that 'property facilitates entrance into community by tying individuals into social groups.'[114] Property gives owners 'a [binding] stake in their communities…. by reducing their mobility, and inducing them to engage more fully in community life'.[115] In the entrance paradigm, community provides stability and sociability that is 'given, not chosen, and … will often be characterized by relatively high costs of exit.'[116] High exit costs occur because individuals over time increasingly identify with, and invest in community; and hence leaving becomes harder. The dividend of high(er) exit costs is 'more robust and deeply satisfying communities.'[117]

Robert Ellickson accepts the logic of property binding people to their community. In writing of U.S. housing co-operatives where rights of re-sale are pre-emptively restricted to below-market rates, he observes that 'reduced owner-occupant turnover may enhance solidarity among the co-operative's households.'[118] In chapter 3, a shareholder in co-operative owned land in northern NSW echoes Ellickson's 'solidarity' and links to community, noting that their share's inalienability means 'we don't waste time wondering if we would be better off living somewhere else, … we have a commitment to place and community.'[119]

The progressive inter-locking of property and community through human flourishing is crucible-like in its mutual self-reinforcement. It yields a composite characterized by the indivisibility of its once separate parts. Penalver speaks to this circularity. 'Our ability to flourish requires the presence of a material and communal infrastructure that itself depends upon

[113] Ibid, 1911- 1918.
[114] Ibid, 1892.
[115] Ibid, 1940.
[116] Ibid, 1894. 'The longer a person participates in a community, the more her life and her identity will become bound up with that community and, as a consequence, the higher her costs of leaving that community will climb.' Ibid, 1923
[117] Ibid, 1955. Nicholas Blomley speaks similarly of people using property to 'anchor themselves to community,' Blomley, above n8, 156.
[118] Robert Ellickson, *The Household: Informal Order Around the Hearth* (2008) 58. Elsewhere, Ellickson affirms that public communities are essentially involuntary, Robert Ellickson, 'New Institutions for Old Neighborhoods', (1998) 48 *Duke Law Journal* 75.
[119] Bill Metcalf, *Co-operative Lifestyles in Australia: From Utopian Dreaming to Communal Reality* (1995), 52.

the contributions of each of us.'[120] Conversely, the weakness of a theory that is 'pluralist and incommensurable' is its indeterminacy. Proponents argue that progressive property represents a 'lived experience of moral choice', and rather than being a weakness, indeterminacy is its strength.[121] Critics such as Jane Baron counter that progressive property is simply a conversation about human flourishing, common decency and democratic governance, which fails to send strong enough signals about property rights.[122] Hanoch Dagan intimates that it is overly utopian, and fails to satisfactorily account for an individual's need to satisfy preferences. Dagan is specifically critical of progressive theory's insistence on involuntary membership of community.

3.4 Conclusion

The continuum metaphor illustrates the expansive array of property and community interaction. At one end, a neo-liberal nihilist view rejects any conception of community. People are autonomous individuals and their property ownership involves nil consideration of community. Further along the spectrum, anaemic versions of community manifest only as an optional consequence of voluntary personal choice. Property is a unidirectional exit from community. More robust conceptions of community accept that investments in community may be longer-term, involve degrees of reciprocity, and that satisfaction of personal choices can also be measured by non-commodity values. Where community norms inform the contours of property rights, the relationship between the two is necessarily close, and their location on the spectrum adjacent. And furthest from the neo-liberal perspective, theories of progressive property inextricably meld community and property through the medium of human flourishing. Along this spectrum, community

[120] Penalver, above n9, 870; 'Ownership and obligation are deeply connected with each other and their mediating connection is community.' Alexander, above n31, 819.
[121] Alexander & Penalver, above n103, 98-99.
[122] Jane Baron, "The Contested Commitments of Property" (2010) 61 *Hastings L.J.* 917. Baron's criticisms have wider implication, specifically the 'propertiness' of entitlements to 'well-lived lives', a concept central to progressive property theory. The extent to which such rights are more political than legal is moot, particularly where progressive proponents articulate such ideas through an American political prism.

changes from incidental backdrop to intrinsic context, and the role of property spins on its axis from 'exit' to 'entrance' to community.

4. Alternative disciplinary perspectives on property in land and community

As part 3 observes, apart from progressive property, most property theories see 'community' as instrumentalist. It exists to serve welfare-enhancing individuals, or to shape the contours of property rights. Part 4 considers other disciplinary insights into property's relationship with community, principally those of legal geographer Nick Blomley. The part is structured around three perspectives that challenge the 'totalizing and individualizing'[123] private ownership model. The first *maps* distinct property patterns to place, and rejects as inadequate, detached representations of space devoid of particularity and inter-connectivity. The second argues that communities are sites of property *contest*, historical and ongoing, that define community through each conflict. The third sees property as a series of ceaseless *performances* that individually and collectively constitute community by their reiterative *doing*. Mapping, contest, and performance are very different ways of 'seeing' property in community. Each sees property as contextual, each has an ontological view of community, and each is empathetic to the idea that property diversity may be an 'entrance to community' in ways oppositional to property uniformity being its 'exit.'

4. 1. Communities are *maps* of property diversity

The truism that 'context is everything'[124] is not a universal one for property. Indeed, the reverse is more accurate; the nature of modern property in land is abstract and placeless, 'divorced from the specificities and bonds of place and community.'[125] Blomley identifies at the heart of the Anglo common law of property a conscious disembodying from context.

[123] Joseph Singer, *Entitlements The Paradoxes of Property* (2000).
[124] Holder & Harrison, above n48.
[125] Blomley, above n43, 53.

> What relation do legal interpretation and understandings, such as liberalism, have to the places and spaces of social life? According to some… the Western legal project is underwritten by an organized forgetting of [the places and spaces of social life], given that spatial diversity may affect core principles such as the rule of law and legal rationality. [The] English common law has been designed as a form of dis-embedding. The systemization of the English common law crafted by Edward Coke … entailed the attempt at the creation of a unitary legal map in which diverse local knowledges of the law were immediately suspect. Increasingly, legal knowledge is imagined as disembodied, true to its own internal logic.… This was a very conscious project, designed to eradicate the plurality and radical decentralization of legal voices. …[126]

Blomley challenges this 'project'. He traces the 'shared complicities'[127] of real property and cartography[128] that conjointly erased context and diversity from the geography of contemporary communities. While the common law was systematically homogenizing property,[129] Blomley identifies a simultaneous 'cartographic sea change' that caused a 'profound change in social scale, from the world of the local community to the national and international spaces of mercantile capitalism and the nation-state.'[130] The combined effect was to institutionalize a 'displacement of the locus of social identity',[131] such that maps came to represent space as 'an objectified and asocial entity to which only the cartographer ha[d] special access.'[132] 'Cartographic space [wa]s emptied of all the complexities and particularities that give it meaning on the ground.'[133]

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[126] Nicholas Blomley, 'From "What?" To "So What?" Law and Geography in Retrospect', Holder & Harrison above n48, 25.
[127] Sarah Whatmore, 'De/Re Territorializing Possession: The Shifting Spaces of Property Rights' in Holder & Harrison , above n48, 211.
[128] Blomley, above n43, 67-105.
[129] Coke's 'common law systemization' was not only an 'inter-jurisdictional struggle between rival legal structures…it signaled 'a shift in the spatiality of legal knowledge. The legal world is increasingly presented as unitary and centralized, rather than as fragmented and localized.' Ibid, 80.
[130] Ibid, 83.
[131] Ibid, 80.
[132] Ibid, 91.
[133] Ibid, 68.

> The sensuous and tactile nature of premodern mapping…gives way to a rational …presentation of space. Space no longer appears to have a subjective quality, but increasingly appears as an objective and pre-given surface…. This modernist conception of space is that of something to be measured, contained, divided, manipulated, and crucially alienated.[134]

Blomley contests the paradigmatic spatial-legal map by suggesting an alternative *map* that rejects the former's 'essentialized form.' Formulating and drawing such a map is dependent on different spatial representations, 'alternative accounts of law, space, and social life' as well as understanding the 'contingencies, fractures, and conflicts' by which the abstracted map came to dominate.[135]

> To document the hegemony dominant spatializations of property… is not to pre-suppose its ubiquity. There is…striking evidence of other understandings of property. Interestingly such divergent and sometimes oppositional understandings of property can entail very different spatial representations and practices….'[136]

His focus is the modern global city, which he sees as intensely propertied. His objective is to 'unsettle the city',[137] to disrupt the empty ownership model, and supplant it with an alternative that acknowledges that cities are *terra populi,*[138] populated by distinctive communities with unique local practices and 'local knowledge'[139]. It is unnecessary to unsettle the city by resorting to precedents from 'coterminous systems of native justice'[140] or third world legal systems. 'The shock that the "world is a various place" is profound given that we need not look abroad to find legal difference… Local legal cultures closer to "home" are doubly unsettling.'[141] Blomley fleshes out his 'unsettling' city map in 2004, with a case study of the struggling Downtown Eastside precinct

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[134] Blomley, above n43, 91.
[135] Ibid,105
[136] Ibid, 55.
[137] Ibid
[138] Ibid, 93.
[139] Property law is … "local knowledge", Ibid, 56.
[140] Ibid.
[141] Ibid, 57.

in Vancouver. Blomley cites community claims to an abandoned department store, struggles against gentrification and over-development, community 'ownership' of a small neighborhood park, and the spread of 'garden encroachments' into urban blight, as exemplars of how competing and unorthodox property can be mapped to specific place. Blomley concludes that 'a closer examination of urban property reveals a greater diversity of possibilities than the map suggests… The ownership model however invites us to overlook or ignore these other estates'[142], 'to gloss over the plurality of "legitimate" claims and interests in land.'[143]

Blomley posits that the true map of urban property is (ironically) 'revealed' by default, through gaps on 'conventional' city maps. This is unsurprising, given that real property has a negative relation[144] with place that renders 'localization and heterogeneity' invisible.[145] Blomley reasons that the primary purpose of cartographic mapping is to arbitrate, not record, determining not so much 'what is property', but what to *count* as property.[146] To accurately capture the social intricacies of city life, diverse property must be re-embedded into its fragmented locality. Blomley exhorts that maps of such multiple geographies should not be ignored. 'In large part these maps have not been documented in critical scholarship. This is not because they are absent but because no one has looked for them.'[147]

Paul Carter is one scholar who has looked for such 'maps'. Carter questions why 'our representations of the world have become so hard and dry', and why we treat as authoritative, maps that contain 'no trace of the knower.' [148] Like Blomley, Carter attributes blame to Enlightenment geography, arguing that '[t]he rectilinear grid imposed on the earth's surface… ha[s] no connection to

[142] Blomley, above n8, 22.
[143] Ibid, 18.
[144] Nicholas Blomley, 'From "What?" To "So What?": Law and Geography in Retrospect', in Holder & Harrison above n48, 17. 'The tendency of the law [is] to erase spatial specificity and local difference in the name of an ordered and apparently cohesive unity.'
[145] Blomley, above n43, 79.
[146] Blomley, above n8, 15.
[147] Blomley, above n43, 54.
[148] Paul Carter, *Dark Writing Geography, Performance, Design* (2009) 5, 8.

the lie of the land- and in a sense, no interest in it.'[149] Carter contrasts modern maps with the 'maps' of Australian Aboriginal artists, especially those of the Western desert school, which first come to prominence in the early 1970s.

> The Western Desert painters…felt no need to read a painting from right to left or from a standing position as presented upon a wall. A work was read from any direction, as if it were lying upon the earth, and able to be walked about…. The Papunya artists appear not to have had names for their paintings. Asked what they called them, they might reply simply…"mine" or "my country". The white reception of these paintings endowed them with an orientation.[150]

Carter concludes that lines on maps are simply 'narrow pencils of shadow…dark mortar joining the parts of the world together.' Carter shifts the focus from what is seen to what is unseen. Radically re-orienting our perspective reveals what Carter calls 'dark writing', 'the swarm of possibilities that had to be left out when the line was taken.'

The act of *mapping* property diversity within variegated community is a direct challenge to the private ownership model, since the latter 'renders other modalities of ownership invisible. [It] leaves no space for property that is neither private nor public.'[151] By finding that space, by entertaining the 'swarm of possibilities' left out, a fuller, and more robust picture of community appears.

4. 2. Communities are places of property contest

The ability to see diverse property patterns in community, to 'notice the marginal',[152] is heightened by an awareness of the contested nature of property in land. In the case of many Israeli property scholars, it is the backdrop of Jewish settlements on disputed territory.[153] For South African property jurists, the contest is racial as well as conceptual, a conflict between

[149] Ibid, 80.
[150] Ibid, 127-128.
[151] Blomley, above n8, 15.
[152] AJ van der Walt, 'Property and Marginality' in Alexander & Penalver above n4, 91-97.
[153] Nomi Stolzenberg, 'Facts on the Ground' in Alexander & Penalver, above n4.

pre and post apartheid property.[154] For Blomley it is the historical narrative of his childhood village in the English Home Counties, where 'enclosures in the 17th and 18th centuries swept away many traditional commoner's rights in the name of improvement and monetarization… [and conflicts] were fought out in the [surrounding] woods, fields, and villages.'[155] By contrast, the traditional, settled view of property in land as ordered and peaceful is a stable and uncontested monotone. Ongoing contest or 'resistant re-mapping' seems an important sub-text to property diversity.

Blomley extends his 18th century agrarian analysis to the modern city, comparing the contextualized plurality of pre-enclosure England with the heterogeneity of urban place.[156] Yet the city is more than an analogue, it is a contemporary iteration of an ongoing contest, part of a continuum - the historical resistance against the loss of the commons. Eighteenth century commoners are now the twenty-first's marginalized and poor. 'Struggles over the spaces of the city can be understood as part of the long-standing struggle to resist the enclosure of the commons, and carve out a right to place.'[157] Where private interests prevail over the collective, not only is community property displaced, it also 'appropriates and encloses. It turns a collective interest into an individualized one.'[158] Further, it is a contest that seems destined to continue, at least in less affluent neighborhoods that contest the assumption that property is settled and peaceful. The Downtown Eastside 'is itself created through that contest, serving in turn to become a vital symbolic and practical component in future contestations.'[159]

Contest also occurs across different planes of understanding. Not only is resistant re-mapping a conflict between private and collective forms of property; it is a more profound struggle over the meaning and ultimate form of

[154] Van der Walt writes of a property law taught in law schools relevant to privileged white residential areas and business, compared to the property law of much of the black majority, AJ van der Walt, 'Property and Marginality' in Alexander & Penalver above n4.
[155] Blomley, above n8, xxii.
[156] Blomley, above n43, 79; Nicole Graham, *Lawscape Property Environment Law* (2010).
[157] Blomley, above n8, xix.
[158] Nicholas Blomley, 'Enclosure, Common Right and the Property of the Poor', (2008) 17(3) *Social & Legal Studies* 311, 316.
[159] Blomley, above n8, 54.

modern property. Thus at one level, planning disputes over gentrification conceal conflicts between individual property rights and localized community ownership: '[C]ontemporary development contentions often pit the developer-owner's private property against the community's common property.'[160]
At the macro level however, the contest thrown up by property diversity is a direct challenge to the hegemony of property's central logic.

> For those opposed to gentrification, the concept of "community" is understood not as a disaggregated bundle… but as a localized set of relations that is conceived exclusively in terms of social interaction and effective bonds.[161]

Blomley argues that private property *must* continue to police and sanction its own property relationships, and discredit public and communal alternatives.[162] To concede once is to condone the enactment of alternative claims in land, one lost battle that is a portent of a lost war, 'the possibility, perhaps even the inevitability, of rearticulations of property.'[163]

Seeing property as *contest* is to recognize that the dominant iteration of property is far from settled. Contest is integral to marginal property analysis, premised on an awareness 'that property rules and practices are vague and contested rather than clear and consensual.' Where there is a focus on 'dissent and contention rather than…. apparent consensus'[164] the diversity of property, and its links to community, manifest.

4.3 Property in community is performed

The idea of property as *performance* has arisen through the influence of geographers, such as Yi-Fu Tuan, who define place as a metaphor for

[160] Blomley, above n158, 317.
[161] Blomley, above n8, 94.
[162] Ibid, xvi, 22-3.
[163] Ibid,18-9.
[164] AJ van der Walt, 'Property and Marginality' in Alexander & Penalver above n4, 104.

stopping, resting and becoming involved. 'Enclosed and humanized space is place. Compared to space, place is a calm center of established values.'[165] Yet despite the images of rest and contemplation, the idea of *becoming involved* encompasses connectivity and constant practice. 'Places need to be understood as sites that are connected to others around the world in constantly evolving networks which are social, cultural, and natural. Places need to be understood through the paths that lead in and out.'[166] And once aligned with such networks, place must be constantly affirmed through reiteration, quotidian social practices that make and re-make. The need for constant practice therefore means that place is never finished, it is a perpetual work in progress.

As discussed in chapter 5, performance theory supposes that property is a 'relational effect, not a prior ground, that is brought into being by the very act of performance.'[167] *Doing* does not merely describe or represent property, it *enacts* it. Geographers use performance theory to constitute 'place'. Tim Cresswell argues that 'places are never established. They only operate through constant and reiterative practice - place is made and remade on a daily basis.'[168] Nicholas Blomley says that where performance theory is applied to property, it challenges the modalities of the ownership model that recognize only two temporal moments, the initial creation of property, and any subsequent transfer(s) of title. Instead, time is always important, as performance belongs in the constant acts of doing. 'Property depends on a constant doing. The enactment of property… entails various forms of continuing persuasive practice.'[169] The constancy of performance over time also has a citational effect, one successful act 'cites other performances, and in so doing, compels future similar performances.'[170]

[165] Yi-Fu Tuan, above n47, 54.
[166] Cresswell, above n, 16, 43.
[167] Nicholas Blomley, Nicholas Blomley, 'Performing property, making the world' at http://ssrn.com/abstract=2053656, 13.
[168] Cresswell, above n16, 38-9.
[169] Blomley, above n8, 22.
[170] Blomley, above n167, 17.

Performances of property are not always positive, or optimistic. They may constitute a new community that displaces or dispossesses an earlier one, such as Stolzenberg's Jewish settlements on disputed Palestinian territory. The performance of these altered 'facts on the ground' 'transform[s] de facto possession into de jure reality,'[171] the goal to create new communities with such an entrenched land memory,[172] that they cannot be uprooted. Such non-innocent performances underscore the negative, exclusionary realities of community previously described.

Good or bad, if property is *doing*, it becomes intimately contextual, rooted to its places of performance. *Doing* is the antithesis of detached objectivity; it is 'grounded in locally lived experience.'[173] Whether mapped, contested or performed, what Nicholas Blomley calls 'alternative landscapes of property' offer new ways of seeing and explaining property in community. Their effect is to unsettle 'the divide between abstract representations and grounded materiality',[174] and the paradigmatic premise upon which property uniformity is built.

5. Why is property, and property diversity, important to community?

Property as 'exit from community' exerts a powerful normative force. As part 2 illustrates, it obfuscates how 'community' is defined. Part 3 argues that it relegates legal theories that explain property and community interaction to the spectral margins. And as part 4 exemplifies, it takes new, alternative perspectives on property in community to make sense of what occurs on the ground. In sum, the private ownership model sets 'property as exit' as the default. Part 5 argues that property's importance to community is both central and under-rated. Yet this centrality is overlooked. By contrast, property diversity has the potential to re-set this default calibration. Diversity and its balance of property values not only reflect the ground-level 'truth' of community; it also, as Hanoch Dagan notes, shapes and determines the

[171] Nomi Stolzenberg, 'Facts on the Ground' in Alexander & Penalver, above n4, 113.
[172] Penalver, above n9.
[173] Blomley, above n8, 55.
[174] Ibid.

contours of community.[175]

The centrality of property to community is not unremarked. Kevin Gray opines that '[t]here is no community on earth without some concept of property: property is too closely intertwined with the preservation of our social and economic arrangements….'[176] To Alexander and Penalver 'property stands … squarely at the intersection of the individual and community because systems of property are always at the creation of some community. Whenever we discuss property, we are unavoidably discussing the architecture of community and the individual's place within it.'[177]

Jeremy Waldron was critical of decisions made by American city authorities in the 1990s that restricted access by homeless people to public spaces such as parks, footpaths and public toilets. This demonization of the homeless effectively rendered them 'property-less', denying them space to undertake basic human functions such as sleeping, eating or urinating. Waldron argues a group in a community who bears all the restrictions of property, but none of its benefits, is 'less free' than others.

> Everything that has to be done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it. Since we are embodied beings, we always have a location…. One of the functions of property rules, particularly as far as land is concerned, is to provide a basis for determining who is allowed to be where. For the purposes of these rules, a country is divided up into spatially defined… places. The rules of property give us a way of determining, in the case of each place, who is allowed to be in that place, and who is not….[178]

Waldron observes a basic truth of the relationship between property and community. Property's rules regulate and enforce entitlements to exclude on embodied place. It tells people where they belong or not, and in the process

[175] Dagan, above n83.
[176] Kevin Gray, 'Property in a Queue' in Alexander & Penalver, above n4, 192.
[177] Alexander & Penalver, above n29.
[178] Jeremy Waldron, 'Homelessness and the issue of freedom' (1991) 39 *UCLA Law Review* 295, 296.

sketches a rudimentary outline of community's skeletal structure.

Yet the 'sketch' of community that the ownership model draws is simplistic and under-developed, rendered incomplete by Blomley's multiple gaps. These absences include not only the inconvenient patchworks of public and common spaces scattered amidst the private estate, but also the unorthodox property claims of community, and the physicalized implications of private property's social and communitarian values.

To 'see' beyond the private ownership model is to recognize the 'concealed' property patterns that suddenly materialize, the 'maps'[179] that emerge and reveal a pluralistic, inter-connected and proportionate landscape of community; private, public, and communal. To see property in the diversity of its accepted and eclectic forms is to establish (and maintain) an infrastructure that is 'the medium [for] the material and metaphorical embodiment of community'.[180] To borrow from Hanoch Dagan, property diversity is 'a complex piece of music with full orchestration'; its alternative is 'looking only at a melody line [that] risks missing most of the performance.'[181]

Part 5 canvasses a number of implications of property diversity for community. The list is not exhaustive. First, it highlights that property diversity and community are complementary, that the architecture of community is moulded by the heterogeneity of property. Second, it observes the 'normative mosaics' that are a corollary to each re-drawn map of diverse property. Normative mosaics not only reflect a community's localized 'balance of property values', but they are also in turn constitutive of each community. Third, it creates a theoretical space for 'community' in an otherwise barren liberal binary worldview. Fourth, it explains the relevance, and unrealized potential, of what Andreas van der Walt calls property's 'eclectic marginality.' And fifth, it gives physicalized context to a variety of performances that collectively constitute and give meaning to community. The import of these

[179] Blomley, above n8, 89.
[180] Brown, above n42, 335.
[181] Dagan, above n83, 72.

implications lie in their joint and several ability to make clearer, and in the process, normalize the links between property and community.

5.1 Facts on the ground: a community's architecture

A snapshot of any community in Nicholas Blomley's 'intensely propertied' city, reveals a 'diversity of property on the ground.'[182] Communities comprise a patchwork of private, public and common lands that adjoin, interconnect, overlap and compete. Property diversity is the embedded architecture of community, a faithful representation of the 'facts on the ground.' It creates, maintains, and enforces the structure of private, public and community spaces, as well as hybrid zones that are not so clearly delineated.[183] It determines formally and informally[184] 'who is allowed to be where.'[185]

This pluralistic image accords with what Hanoch Dagan calls 'the lived experience of property',[186] the mix of property institutions that reflect an infinite multiplicity of human relations and physical contexts. Indeed Dagan suggests that it if we were to start afresh with a blank slate, it would be extraordinary if property was conceived as a formless, context-free bundle of rights.

> I believe that property should be construed as it actually is in law and in life: a set of institutions, each constituted by a particular configuration of rights. More precisely: the meaning of property, the content of an owner's entitlements, varies according to the categories of social settings in which it is

[182] Blomley, above n8, 15. More 'diversity of [property] possibilities than the map suggests.' Ibid, 22.
[183] 'Property law is like a language that direct[s] the shapes of physical spaces.' Carol Rose, 'Property and Language, or, the Ghost of the Fifth Panel' (2006) 18 *Yale Journal of Law and the Humanities* 1, 3.
[184] 'Property rights are based partly on formal documents of title…and partly on expectations that grow from informal arrangements such as long-standing possession, a course of dealings, oral statements, informal understandings, personal relationships, social practices and customs of the trade.' Joseph Singer, *Entitlement: The Paradoxes of Property* (2000) 45-6.
[185] Waldron, above n178, 296.
[186] Dagan, above n83.

> situated, and according to the categories of resources subject to property rights.[187]

To deny the patency of such 'facts on the ground' is in Blomley's words 'geographical nonsense, [an] anti-geography' that fails to contend with 'the complex spatiality and the "place-boundedness" of society.'[188] Blomley says that property must conform to this geographic and structural diversity. To do otherwise would be to condone a taking. For if property is theft, as Pierre-Joseph Proudhon suggests, then Blomley's riposte is that

> The larceny entails that of the diversity (and perhaps the radical potential) of property. … Cities are sites in which people live inside the ownership model, but also depart from it. Collective claims to land and space are made. And private property turns out to be a good deal more multivalent, both ethically and analytically, than is supposed.[189]

Amnon Lehavi likewise prefers the truthfulness of 'facts on the ground', where communities are given form and structure as a panoply of property type.

> [C]ontrary to the intuitive association between communality and common property, the lives of communities necessarily involve the full range of property regimes, including private, public, common, open access, and mixtures of these forms, as well as informal modes of resource control and management. This richness is not only a matter of fact, but also has normative merit.[190]

5.2 Normative diversity: a plurality of property values

Lehavi's second observation of 'normative merit' speaks to another implication of property diversity and community, the richness of diverse social values that arises from heterogeneity. Private, public and common property is each grounded in different, often complementary, social values.[191] As Hanoch

[187] Hanoch Dagan, 'Reimagining Takings Law', in Alexander & Penalver, above n4, 48.
[188] Blomley, above n8, 53.
[189] Ibid, 15.
[190] Lehavi, above n36, 45.
[191] Dagan, above n22, 3, 20.

Dagan observes, 'property, is deeply involved in our social values, reflects them, and at times even participates in their formation.'[192] When 'mapped' across community, each property type therefore contributes proportionately to an infused aggregate that is both reflective and constitutive of the community in question.

The values and ideals of common and public property have been traversed in earlier chapters, the likes of sociability, 'pedestrian democracy',[193] and shared moderation of resource use. By contrast, the values of private property are typically individualistic and exclusive,[194] the antithesis of community. However, as discussed in chapter 4, private property also has overlooked social and communitarian dimensions,[195] a vindication of individual independence (*personal autonomy*[196]), a commitment to personal identity (*personhood*), and the aggregate welfare of *community*.[197] These values do not diminish private property, but rather enhance it, by playing a 'crucial role in supporting diverse forms of interpersonal interaction and thus diverse forms of human flourishing.'[198]

For Eric Freyfogle, the links between private property and its normative values are explained by historical context. Freyfogle argues that private property only 'makes sense' where it serves or promotes the *public good*. Its legitimacy depends on the rules of private property reflecting prevailing societal values.[199] Until the late 19th century, private property conformed to *settled*, agrarian values, where quiet enjoyment, a qualified freedom from

[192] Ibid, 4.
[193] Kevin Gray, 'Pedestrian Democracy and the Geography of Hope' (2010) 1 *Journal of Human Rights and the Environment* 45.
[194] 'Central to the idea of (private) property is exclusion', Shyamkrishna Balganesh, 'Property, Like, But Not Quite Property' (2012) 160 *U. Pa. L. Rev.* 1889, 1899.
[195] Private property is 'diverse and pluralistic in terms of its institutions, doctrines, and values.' Hanoch Dagan, Property and the Public Domain (2009) 18 *Yale Journal of Law and the Humanities* 84, 84.
[196] Dagan above n22, 18, 29; Dagan describes personal autonomy as 'an entitlement to the property needed to sustain human dignity', Ibid, 30.
[197] 'Property institutions can, and often do, create an institutional infrastructure that facilitates the long-term cooperation necessary for successful communities fostering human flourishing', Ibid, 30.
[198] Ibid, 33.
[199] Eric Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (2007) 20, 25-6.

unreasonable interference, was its core rationale. This then shifted to an aggressive, industrial view, 'a right to halt physical invasions of space',[200] that matched a new priority, maximizing the exploitation of land.[201] Freyfogle yet again detects a shift in the early 21st century, where the public good may be served by private property reflecting emerging ecological and environmental values.[202] Freyfogle inserts *community* into this new value paradigm. 'For private property to serve contemporary society it needs to move in … the direction of community, responsibility and social connection.'[203] The valorized *sense* of private property in this century may be its relevance to community.

A multivalent private estate, combined with the norms of public and common property, produces a rich and variable mosaic of property values. Its variability depends on the property mix in each community; the end composition being what Dagan terms a '*local balance* of property values.'[204] 'Local' implies a bounded place that shares degrees of social commonality, while 'balance' refers to the *relative proportion* of one property value vis-à-vis others. In practice, the most likely 'balance' is the ratio of private values to public and community ones.

One logical enquiry that flows from 'local balance' is the implications of imbalance. To adapt another Dagan proposition,[205] the relative proportions or degree of the mix may influence how individual communities constitute (and thereby see) themselves. Kunstler's study of the decline of America's cities tangentially touches upon this issue of relative mix. Kunstler blames a multitude of factors for urban decay; the car, the rise of ubiquitous shopping malls, and so on. He also singles out the decline of public property, which he attributes to a post World War II phenomenon that is 'an extreme

[200] Ibid, 56.
[201] 'This was the legal right that industries valued the most, because it allowed them to keep people off their lands.' Ibid.
[202] Freyfogle, above n97, 133.
[203] Ibid, 279-280.
[204] Hanoch Dagan, 'Reimagining Takings Law' in Alexander & Penalver, above n4, 48. 'Local' implies a bounded locale that shares degrees of social commonality, and 'balance' the *relative proportion* of different property values.
[205] 'Property, is deeply involved in our social values, reflects them, and at times even participates in their formation', Dagan above n22, 4.

individualism of property ownership'. This perversity 'tends to degrade the idea of the public realm, … the landscape tissue that ties together the thousands of pieces of private property that make up a town, a suburb, a state.'[206] Lack of public property leads to isolation, disconnection, and ennui.[207] Re-introducing more public property however provides 'decent public spaces that bring people together into casual face-to-face contact' and overcomes the monotony of private values that are by nature 'homogenizing and intolerant of diversity'.'[208] Sheryll Cashin also draws this link. In 1950, she cites that over 70% of metropolitan Americans lived in central cities. 'As a consequence…. city residents used and competed for the same public institutions-city schools, parks, transportation, and city hall. Common public institutions were a unifying force for a heterogeneous urban polity.'[209] But by 1990, over 60% lived in suburbs dominated by private property. For Kunstler and Cashin, recalibrating the property mix to accentuate a viable public estate may mean that 'Americans can have a decent public life, [and] redress the extreme privatization of life in postwar suburbia.'[210]

Georgette Poindexter argues that one implication of property imbalance is an unhealthy idolatry of private property, manifested in 'richly textured social patterns'[211] including the suburban deification of manicured front lawns.

> The maniacal attention to lawn along the "fenceless state" of suburbia can be used as a metaphor for the tension between the individual right to private property and the social interconnectedness of all property. It begs the question: who owns your front lawn - you or your neighborhood…[212]

The effective privatization of public road verges 'eviscerates the neighborliness aspect and relegate[s] the public interest of the wider

[206] Kunstler, above n17, 26-7.
[207] Kunstler, above n17, 14.
[208] Property diversity provides 'odd little corners for people with odd little lives', Kunstler, above n17, 260.
[209] Sheryll Cashin, 'Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism;, (2000) 88 *Geo. LJ* 1985, 1991-2.
[210] Kunstler, above n17, 262.
[211] Georgette Poindexter, 'Idolatry of Land' in Holder & Harrison, above n48, 191.
[212] Ibid, 204.

community … to the silent sidelines.'[213] Accepting the premise that performance constitutes property, Poindexter observes 'land is a practiced place. It is activated by social interaction, cultural significance of place-based identity, and by law. Idolatry flourishes when the law fails to champion the rights of the community.'[214]

Disproportionate private imbalance tends to diminish community.[215] Practically, it impairs a community's self-image and discourages civic participation.[216] Normatively, it elevates the individualistic values of private property (its commodity or exclusionary tendencies), and ignores its other less visible communitarian values. It relegates the public and common estates to the margins,[217] and vigorously resists public 'encroachment'.[218] Imbalance is by its nature a one-sided drawing of community, an incomplete map that empowers private insiders, and consigns non-private outsiders to Paul Carter's 'dark writing'. Private imbalance may explain why Jeremy Waldron cynically concludes that 'inclusive community' is an oxymoron.

5. 3 Locating community in property theory

A third implication of property diversity is the theoretical space it creates for community. In so doing, property diversity potentialises a pre-liberal paradigm, where intermediate entities (such as community) may be conceivably interposed between the state and an individual. In this way, it addresses the existential dilemma that community confronts.

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[213] Ibid, 205.
[214] Ibid, 206.
[215] 'Post-industrial changes eviscerated many pre-determinants of community' and 'prior to the 20th century phenomena of industrialization and urbanization, sense of community was a natural part of life.' Paula A. Franzese, 'Does it Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community', (2002) 47 *Villanova Law Rev*. 553, 565.
[216] Mark Roseland, *Toward Sustainable Communities* (2009) 141.
[217] Such 'marginality' is remarkable where 'open-access public streets and parks' represent up to one-third of an American city's landmass, Robert Ellickson, 'The Inevitable Trend Toward Universally Recognizable Signals of Property Claims' (2010) 19 *William & Mary Bill of Rights Journal* 1015, 1026.
[218] Opposition to public paths or rail trails amongst adjacent private owners is common. Landholders neighboring the Otago rail trail in New Zealand were vocal in their opposition.

Property diversity achieves this because it countenances that there are more property types than the dominant liberal ownership model allows.[219] Property diversity frays the hermetic tidiness of any owner/non-owner, or private/public divide, essential to the liberal paradigm.

> The tendency to view property as essentially private, and periodically public, reproduces the wider tendency to view legal orderings as binary, with a privileging of one pole. We should not be surprised by this, given the prevalence of a particular worldview… which offers a powerful view of law, society, and power. The liberal discourse assumes a view of property rights…as belonging to atomized individuals located in a realm of private liberty, confronting a threatening collective… This clearly fits into the ownership model, with the centrality it accords the individual and the incoherence of collective claims to property.[220]

Property diversity also better explains the nature and importance of community. Liberal views stress the primacy, autonomy, and isolation, of the individual, and by association, their private property. 'The self is … innate, and is not even constituted partially, by relationships with community.'[221] Community, to the extent it is recognized, is seen as a voluntary association, an entity into which rational actors periodically choose to enter and/or exit to maximize their welfare, or enhance their personal choice. At best, community is merely instrumental and incidental. The only compellable relationship an individual has is with the state, and because of this compulsion, it is viewed with suspicion. But as Alexander and Penalver note, such a binary worldview is unsatisfactory.

> The utilitarian focus on community as a means to satisfy individual preferences and the classical liberal focus on the voluntary assumption of community life reflect impoverished understandings of… community. The communities in which we find ourselves…play crucial roles in the formation of our preferences,

[219] 'The city is … crosscut by claims to land that are neither private nor statist.' Blomley, above n8,, 153.
[220] Ibid, 5.
[221] Blomley, above n43, 205.

the extent of our expectations, and the scope of our aspirations.[222]

Carol Rose understatedly observes that 'the common law tradition is not entirely friendly to group [property] rights,[223] and like Blomley, she says this is despite the evidence. While intermediate collective property is 'all around us,' it is 'relatively little noticed'.[224] Rose attributes this myopia to a convergence of many factors, including 'the powerful libertarian appeal of individual property - property seen as that realm in which the individual has ultimate control, free from any intrusion except those she invites, and in which she is free to express herself exactly as she wishes.'[225] In such a realm there is no constraint of community; indeed there is no community.

The 'squeezing out' of community and the creation of a vacant theoretical space between the autonomous individual and the regulatory state is evidenced historically by the decline of the corporate city, and with it, its collective status and power. Nicholas Blomley[226] and Gerald Frug[227] each offer an account as to why city power declined in their respective countries. Their consistent theme is a liberal hostility towards decentralized power, those entities intermediate between the state and the individual. Blomley traces the decline of 'the localized and particularized privileges of the medieval city' to the quashing of trade and mercantile monopolies in the early 17th century. Frug explains that early US cities lost their 'considerable autonomy and agency' when two categories of corporation were created in the 18th century, one public and the other private. The public corporation was seen as an entity identified with the power-wielding state (and therefore suspect), while the private corporation was a rights-holder. The separation of power and rights between public and private corporations was problematic for the city, Frug argues, because once the rights enjoyed exclusively by the private corporation were removed, 'there was nothing left that seemed to demand

[222] Alexander & Penalver, above n4, xxv, xxii-xxv.
[223] Rose, above n183, 13.
[224] Carol Rose, 'Left Brain, Right Brain and History in the New Law and Economics of Property' (2000) 79 *Oregon Law Review* 479, 484.
[225] Ibid, 484.
[226] Blomley, above n43, 99-105.
[227] Frug, 'above n63. Sax says Frug's article is 'a refreshing and instructive exception' to the lack of legal attention to community. Sax, above n3, 499.

protection'.[228] The city shifted 'from an association promoted by a powerful sense of community and an identification with the defense of property, to a unit that threatens both the members of the community and their property.'[229] The city/community fell between the poles of the autonomous individual and the consolidating power of the nation-state,[230] and as a result 'the legal universe [became] at once totalizing and individualizing.'[231] Generically,

> [t]he evolution of liberalism thus can be understood as an undermining of the vitality of all groups that had held an intermediate position between what we now think of as the sphere of the individual and that of the state.[232]

As discussed, recent property and community scholarship suggests that this liberal view may be unraveling.[233] Property diversity is consistent with this trend, one where community re-discovers its synergies with older notions of property in land that are specific and localized, rather than placeless and universalized.

5.4 The eclecticism of property

A fourth implication of property diversity for community is its enabling of alternative conceptions of property in land beyond strictly enforceable right. To be open to *difference* is to reveal a prolific array of practices, norms, and claims that define people's diverse and heterogeneous relationships with land. Such claims include collective property 'rights' being enforced by community, or the notion that a person's sense of belonging is somehow proprietorial. Recognizing the marginal or eclectic[234] is a start to 'seeing' property as something that 'potentially brings a community together, rather than that which separates it into exclusive units.'[235] Nicholas Blomley recognizes the

[228] Frug, above n63, 1108.
[229] Ibid, 1119.
[230] Blomley, above n43, 108.
[231] Ibid, 102.
[232] Frug, above n63, 1088.
[233] Rose, above n183.
[234] 'Marginal' refers to the marginality thesis developed by A J van der Walt. 'Eclecticism' is a virtue according to Sax, above n3.
[235] Davies, above n60, 127.

telltale signs of (an otherwise amorphous) community through its unorthodox claims to collective 'property'. Locked out by the liberal paradigm, community nonetheless finds voice, and importantly form, when it asserts such alternative claims. Property diversity shifts focus from the all-consuming narrative of private property, and countenances the radical possibility of community, and its marginalized, having discernible interests in land.

South African property jurist Andre van der Walt argues that property's 'logic of centrality' blinds us to the importance of its margins. The 'logic of centrality' refers to an habitual acceptance by 'lawyers, owners, and users of property that property institutions naturally assume a central place in society and that property as an organizing concept, similarly assumes a central role in law and legal theory.'[236] The consequences of centrality are twofold, first that intellectual habits about property become unreflective and thereby narrow, and second that this inhibits a 'much needed social and legal transformation that [otherwise] condemn[s] certain persons to the margins of society and of the law.'[237] By contrast, a marginal perspective on property seeks to 'unsettle the assumed "normality condition" of liberal tradition'[238] so that 'we do recognize or "see" the rights [of the marginalized].'[239] Van der Walt's 'unsettling' of liberal tradition shares strong parallels to Blomley's 'unsettling of the city'[240] and its 'resistant re-mapping'.[241] Marginal property finds fertile ground in activist community dissent, advocated by 'property outlaws' who 'offer a view of property law as a dynamic institution… broadly reflective of evolving community values as opposed to a fixed set of natural entitlements.'[242] Blomley's property outlaws are the poor and marginalized in Vancouver's down-market Downtown Eastside,[243] who collectively make claim to a disused ex-department store, Woodwards, as community space. The site is to be converted into gentrified private apartments, but protests,

[236] AJ van der Walt, 'Property and Marginality' in Alexander & Penalver, above n4, 81.
[237] Ibid.
[238] Ibid, 83.
[239] Ibid, 102.
[240] Blomley, above n8.
[241] Blomley, above n158.
[242] Eduardo Penalver & Sonia Katyal, *Property Outlaws: How Squatters, Pirates, and Protestors Improve the Law of Ownership* (2010) 15.
[243] Blomley, above n8, 53.

vigorous claims to the site as 'community property', and (eventually) a sympathetic city council, 'save' Woodwards from private re-development.

> The unitary claim of the developer is challenged by the argument that the poor also have a legitimate property interest in, and claim to, the site. This interest is a collective one – note the frequent invocation of 'us' – and also a clearly localized one. This property interest in Woodward's, moreover, is not one of alienation or transfer. It cannot be monetarized but is, rather, predicated on use, occupation, domicile and inherent need…. The redevelopment of Woodward's is bad, activists say, not simply because it displaces but because it appropriates and encloses. It turns a collective interest into an individualized one.[244]

The marginal perspective on property is by its very eclecticism outside property's central logic. It lacks the imprimatur of formal legal standing or rights status. But it is identifiable to those that seek it, enacted by diverse performances, and occasionally vindicated. It even possesses a certain doctrinal logic.

> Marginality …requires paying more attention to facts and unique circumstances and relying less on abstract principles and doctrine. [It] has its own logic in that it will tend to look for the paradox and the contradiction rather than for broad theory and grand narrative, for diversity rather than uniformity, for dissent rather than consensus, for conflict and chaos rather than consent and order. In other words, it directs our attention to fault lines or historical breakdowns rather than concentrating on or searching for the golden thread of continuity.[245]

Margaret Davies argues that it is desirable for the post-enclosure 'dominant idea of private property' to be 'resisted, challenged or reconceptualized'[246] wherever possible. One such strategy involves 'constructing different concepts of property and/or rediscovering non-private forms of ownership from Western legal history.'[247] As this indicates, Davies sees alternative

[244] Blomley, above n158, 316; Blomley, above n8, 52.
[245] AJ van der Walt, 'Property and Marginality' in Alexander & Penalver, above n4, 100.
[246] Davies, above n60, 115-116.
[247] Ibid, 117.

property in both ancient and modern forms. She cites the *Countryside and Rights of Way Act 2000* as a statutory re-enactment of the former. A manifestation of the latter is a community's contemporary interest in heritage, a shift from erstwhile 'class-ridden' ideas about stately homes, to 'community-based intangible heritage',[248] and a democratic and inclusive version of the collective interest in living streetscapes or communities.[249] Davies draws the link between property diversity and community. She sees it as means to break down atomistic private ownerships into a wider network of property types that brings community together through connectivity.

Amnon Lehavi's 'local public commons' is an example of marginal property that facilitates community cohesion.[250] 'Local public commons' are 'modest' public lands ostensibly owned by local governments (such as parks, playgrounds, or swimming pools) that are claimed and controlled by residents in close proximity to the resource. Lehavi analyses the factors that make successful local public commons work, identifying a neighborhood intimacy that allows frequent users to become acquainted, and develop 'a limited level of reciprocal norms of "contribution in return for use."'[251] Those outside the immediate area rarely use such commons, either because of the cost of commuting, or the availability of similar local commons elsewhere. Nicholas Blomley attributes such collective 'local ownership' to two factors; a history of use and habitation, and a local landscape that is achieved through collective action or political struggle.[252]

Avitil Margalit's *property as belonging* is yet another example of the potential for property diversity to enhance community. Margalit describes the interest of a community of fans in a football club as a *social interest* in property, derived in part from the multiple meanings of 'belonging'.

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[248] Ibid, 128.
[249] Ibid, 130.
[250] Lehavi, above n11.
[251] Ibid, 47; Davina Cooper, 'Opening up Ownership: Community Belonging, Belongings, and the Productive Life of Property' (2007) 32(3) *Law and Social Inquiry* 625.
[252] Nicholas Blomley, 'Landscapes of Property' in *The Legal Geographies Reader*, Nicholas Blomley, David Delaney & Richard Ford eds., (2001) 124.

> Something "belongs" when it is an attribute or a part of a person or thing. Moreover, to belong means to be a member of a group or an organization. Finally, belonging also denotes a property relationship -when something belongs to a person, it means that it is the property of that person. [253]

Davina Cooper also sees property as belonging. Cooper's communitarian study of a maverick English school identifies *collective identity* and *community* as constituting 'a quite different understanding of property.' Property relations between students and teachers reflect a 'tension between the right to exclude and the norm of inclusion…. While the right depicts things and spaces as [conventional] property… the norm represents the space as property, in the sense of being constitutive of community life.'[254] Cooper surmises that this 'socially variegated' school community only makes sense to outside observers such as herself if 'the black box of unofficial property interests' is opened up.

> State law is not unimportant…. in many contexts, state law will prove the dominant normative structure determining practices and outcomes. However, in contexts where other institutional authorities have significant effects, where property interests are fragmented, and the power ensuing from such interests is limited, fluid, and contested, a broader and more open approach to what counts as propertied things and relations, which can look beyond the kinds of property forms recognized by state law, is important. An analysis that only sees Readhead's [the school owner's] property interests not only misses, but also misrecognizes, what is taking place.

Seeing the eclectic in property enables a 'creative bricolage' with the dominant and 'oppositional ownership model',[255] an interaction that potentialises creativity and flexibility in our thinking about property. Diversity enables collective claims to property outside the ownership model, and as a consequence aggregates otherwise disconnected elements of community. As van der Walt counsels, '[w]e cannot afford to see the hegemony of the normal,

[253] Margalit, above n52.
[254] Cooper, above n.251.
[255] Blomley, above n8, 23.

the everyday or the mass consensus as a norm; we have to leave room for otherness, for difference.'

5.5 A diversity of performance

A fifth implication of property diversity lies in the sheer variety of performances of property that occur across a community. The collective sum of this *doing* is Hanoch Dagan's full orchestration of property in community, a complex harmony that correlates to the intricate patterns of property right, use, and claim ambitiously 'mapped' by legal geographers.

Property diversity means that across community, there are many and varied enactments of property across many and varied venues. Private property is created by 'fence-building, instructions to children not to cross someone else's lawn, the installation of security systems, and property registration.'[256] Such performances enact and affirm the normative values of private property; privacy, commodity, and personal autonomy. On public lands, people likewise perform acts that affirm values such as sociability and inclusion; playing Saturday soccer on sports fields, hiking though urban forests, or picnicking in riverside parks. And on common property, eligible owners assert common use rights that reinforce proportionality and shared moderation; tending community gardens, exercising membership rights in clubs or co-operatives, or using common property such as pools or tennis courts in strata schemes.

The collective narrative of property diversity is the narrative of community, a myriad of enactments that are physicalized to bounded location, and representational of sense of place.[257] 'Owners' of diverse property, whether enforceable right, or valorized sense of belonging, perform a conception of property that is not by automatic default external to community.

[256] Blomley, above n 167, 14.
[257] Blomley, above n8, 22-3.

6. Conclusion

This chapter argues that property in land and community share a close relationship, albeit one that is not overtly recognized, defined, or theorized. Property in land is both structural and constitutive of community. It reflects how community is made up. 'Maps' of property patterns in community can be detached cartographic outlines that reflect the simplicities of the private ownership model. Or as Nicholas Blomley argues, alternative maps can be drawn that capture the eclectic, inter-connected modalities of property beyond the orthodox. Property, and its range of diverse values, is also constitutive of community, its normative measure.

Yet routinely property is seen as 'exit from community'. Property is the private realm of autonomous, welfare-maximizing individuals. As best, community is an instrumentalist (and optional) construct that exists to serve such individuals. At worst, narrow private values eviscerate community. The significance of property diversity lies in its potential to recalibrate this 'property as exit' default. As part 5 canvasses, property diversity has many implications for community. It tells its geographic truth and conforms to its structure, it yields commensurate mosaics of property values, it finds it theoretical space, and it potentializes alternative property paradigms grounded in the 'real-world' context of community. Property diversity helps to fill Joseph Sax's 'missing blank'.

Conclusion

This thesis promised in its introduction 'not to take property for granted.' It also promised 'to be attentive as to how things are *not*.' In trying to keep to these commitments, it has explored two key questions – what comprises 'property diversity' in land, and what are (at least) some of its implications for our propertied landscapes. Its call to action is to be conscious of the myopic constraints that limit our 'seeing' of property in land. Optimally, we should be enlivened to property's imaginative possibilities. If, as Carol Rose warns that 'what we see is what we get', then we must be prepared to be open to the possibilities, to the seeing of something paradigmatically new, 'with all the effects on understanding and action that a new "envisioning" may bring.'[1]

In responding to these two enquiries, this thesis has canvassed the literature of the private, public and common estates, property and community scholarship, and stewardship discourse. It has also reached beyond legal property scholarship in its review of legal geography and sustainable urban design. Its novelty lies in not only collating this literature into one body of work, but in viewing it through the prism of landed property diversity. Some of this literature is extensive, in particular that of common property or stewardship. Other literature is emergent, like property and community. And other areas are surprisingly threadbare, of which the standout is the near vacuum of public property jurisprudence.

The thesis also flagged numerous concepts worthy of further study. The theoretical underpinnings of public property in land, especially the relationship of propriety to inclusion, remain underdone. Likewise there is much scope to expand on the coincidental convergence between discernible patterns of property diversity, and the design and functioning of livable communities. Another idea meriting wider investigation is the 'mapping' of the property mosaic to specific place, reducing the complexities of diversity and inter-connectedness to pictorial form. And yet another putative project lies in the

[1] Carol Rose, 'Seeing Property' in *Property and Persuasion Essays on the History, Theory and Rhetoric of Ownership* (1994).

implications of 'local balances of property values.'[2] How constitutive of community are its relative patterns of property? Does 'too much' private property inform a community markedly different to one with extensive public or community estates? Each line of (now future) enquiry has proved to be beyond the scope, and word length, of this present thesis.

Another major item of 'unfinished business' is the question, what if the private ownership model is not an inadvertent or accidental default, but a positive normative choice? What if the atomized, 'property as exit' iteration of property in land is a conscious, societal preference? Is property diversity then reduced to an esoteric and ultimately moot exercise that seeks out 'in Canutian fashion … property forms that buck the trend'?[3]

A tentative answer to this particular 'unfinished business' is to recognize that property is likewise, and perpetually, unfinished business. As chapter 1 outlines, the idea of private property has constantly evolved. Prior to the 18th century, there was 'no clear and unqualified definition' of private property in any 'legal dictionary or the works of any legal writer.'[4] Yet by the end of the 20th century, private property seemed unassailable. Property's meanings and dimensions ebb and flow with the tide of societal imperative. What now appears settled and appropriate – arguably the result of our present normative choices - may not be so felicitous in the future.

Performance theory suggests likewise. If property is enacted by ongoing, infinitely variable performances, there is no inevitability that these performances are locked into a 'closed loop.'[5] Things change. Where different performances of property make better contextual sense, analogous performances are likely to recur, and incrementally a new pattern manifests that becomes citational in its reiteration. As recent property history shows, these shifts are imperceptible, since 'every morning, as we wake up, property

[2] Hanoch Dagan, 'The Public Dimension of Private Property' (2013) 24(2) *Kings Law Journal* 260, 274.
[3] Nicholas Blomley, 'Performing property making the world' http://ssrn.com/abstract=2053656.
[4] Nicholas Blomley, 'Making Private Property: Enclosure, Common Right and the Work of Hedges' (2007) 18 *Rural History* 1, 4.
[5] Blomley, above n3.

is – more or less – as it was when we went to bed.'[6] It is rare to 'see' the precise moment when different property performances begin, except perhaps in retrospect, or through the eyes of the prescient observer. In chapter 5, the closing discussion of 'earth under the nails' chronicles the 'extraordinary' rise of ancient and new ways of engaging with the physicality of land. Sue Farran's communitarian phenomenon may be the forerunner of some paradigm shift, or it may be a false dawn. But either way, it is testament to property's dynamism. 'The very necessity that property has to be performed – often through bodily practices – opens the possibility, perhaps… the inevitability, of rearticulations of property and subjectivity.'[7]

If property is a series of ceaseless performances, then Nicholas Blomley's 'truth versus success' critique directs us to the most important question - what sorts of performances render alternative property paradigms less marginal and thus more successful? Chapter 4 points to the thoughtful design interaction of private, public and common space, and the observable outcomes this has for sustainable human landscapes. Chapter 5 'sees' cross-boundary collaborations of good land use. Chapter 6 identifies performances of diverse property that find legal space for community. Indeed, this thesis is one such 'act', a written 'performance' of an envisioning of a different property in land that challenges how we describe the so-called dominant paradigm.

The private ownership model is (mostly) our propertied reality because that is what we practice, day in, day out. It is 'successful' because it largely *is*. The extent to which it purports to tell property's 'truth',[8] or reflects majoritarian sentiment, or conscious normative choice, is secondary to its pragmatic reality. In restricting ourselves to this narrow paradigm, we have got back what we see. But as this thesis illustrates, this paradigm has consequences. It is abstract. It views land as commodity. It divides the world into

[6] Ibid.
[7] Ibid.
[8] Stuart Banner says that 'philosophers and law professors try to discern property's true nature' but usually without success. Banner concludes that property 'is a human institution that exists to serve a broad set of purposes. These purposes have changed over time, and as they have, so too has the conventional wisdom about what property is "really" like.' Stuart Banner, *American Property* (2011) 289-90.

disconnected atomized parcels. It makes adverse land use externalities 'magically disappear'. It marginalizes the communities in which we live. Stuart Banner's remark (in chapter 5) that property academics bear a certain responsibility for the rise and entrenchment of property abstraction is equally cogent for property diversity. Perhaps it is incumbent on us to have teach less *Blackacre* and more the variegated 'where we live'.

What does this thesis mean for property law? As a body of work, the thesis is a nuanced description of a re-conceptualized property right in land that (notwithstanding its explorations of diversity's outer limits) remains grounded in the common law, and the common law jurisdictions discussed herein. However, in extolling the descriptive virtues of a wider 'seeing', it has institutional consequence. At one level, it deliberately sets out to break the nexus between 'property', and the reactive universalizing assumption that 'property' is only the private right. At another level, it means that the *res* matters. The thing, in this case, the land, is not simply the object of the property relationship; rather it is an integral part of it. This implication is significant because it departs from the orthodoxy that property is a unified category. If context matters for *real* property, then what does this mean for other forms of property? What is the effect of one property type diverging from the core tenet that property is not dependent on the nature of the *res*?

From the outset, this thesis has explicitly restricted itself to land. It has (unwittingly) taken Henry Smith's modular approach by concerning itself only with the module called 'real property'. In so doing, it has ignored extra-modular impacts. Perhaps, like Smith's metaphor, where side effects are intensely felt within the module, but have negligible impact outside, any spillover from this reconceptualization may be self-absorbed and largely self-contained. As James Karp observes in chapter 5, maybe land *is* fundamentally different. Yet as logic dictates, this difference does impugn the integrity of the unified category of property. This thesis acknowledges the irony that in looking at the broad diversity of *real* property, it has itself been myopic to consequential effects outside the 'module'. This paradox joins the ever-expanding list of 'spin-off' topics worthy of subsequent study.

The private ownership model is a descriptively inadequate and incomplete account of ‘what happens on the ground’. ‘Seeing’ the extent of this paucity is a first and necessary step in starting to ‘imagine’ the ‘swarm of possibilities’ that a diverse reconceptualization offers property in land.

[END]

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